Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

v.

MICHAEL COOPER, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "objective reasonableness" standard as set forth in *Graham v. Connor* 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.2d* 443 (1989) present an issue of fact to be determined by the jury, such that disposition of the issue on summary judgment is improper where plaintiff has presented evidence showing that plaintiff's decedent died as a result of excessive physical restraints?

2. Under applicable standards of Fed.R.Civ.P. 56, may civil rights claims under § 1983 alleging excessive force by police officers be dismissed on summary judgment without a careful review of plaintiff's expert testimony?

LIST OF PARTIES

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, individually,

Plaintiffs,

MICHAEL COOPER, Individually and as a Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; Ambulance Attendant DAVIS, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICA aka Med VII); DAN MAC MAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive (MICA aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Federal Statutes Involved 2

Statement of the Case 5

Procedural History 9

Legal Argument 10

Point I – Certiorari Should Issue so That This Court May Clarify the Ambiguities That Exist in Applying its Ruling in *Graham v. Connor* With Regard to Whether "Objective Reasonableness" is Ordinarily a Jury Question 10

A. The Decision Below is Sharply Contrasted by Decisions in Other Circuits, Which Hold That "Reasonableness" is an Issue of Fact, not One of Law 13

Point II – Certiorari Should Issue so That This Court Can Settle the Apparent Conflict Among the Circuits Regarding the Necessity for a Court to Carefully Review Expert Testimony in § 1983 Matters Involving Police Misconduct 19

Conclusion 22

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 *U.S.* 242, 106 *S.Ct.* 2505, 91 *L.Ed.2d* 202 (1986) 17

Brisk v. City of Miami, 726 *F.Supp.* 1305 (S.D.Fla. 1989) 16

Bruner v. Dunaway, 684 *F.2d* 422 (6th Cir. 1982), *cert. den.*, 459 *U.S.* 1171, 103 *S.Ct.* 816, 74 *L.Ed.2d* 1014 (1983) 18

Byrd v. Clark, 783 *F.2d* 1002 (11th Cir. 1986) 17

Calamia v. City of New York, 879 *F.2d* 1025 (2d Cir. 1989) 14

Chew v. Gates, 27 *F.3d* 1432, 1443 (9th Cir. 1994) 13

Fitzgerald v. McDaniel, 833 *F.2d* 1516 (11th Cir. 1987) 15

Gagnon v. Ball, 696 *F.2d* 17 (2d Cir. 1982) 17

Graham v. Connor, 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.2d* 443 (1989) ..... *passim*

Hammer v. Gross, 932 *F.2d* 842 (9th Cir. 1991) 13

Janicsko v. Pellman, 774 *F.Supp.* 331, 342 (M.D.Pa. 1991), *aff'd*, 970 *F.2d* 899 (3d Cir. 1992) 15

Kopf v. Skyrm, 993 *F.2d* 374 (4th Cir. 1993) 20

McDowell v. Rogers, 863 *F.2d* 1302 (6th Cir. 1988) 15

Melear v. Spears, 862 *F.2d* 1177 (5th Cir. 1989) 15

Powell v. Gardner, 891 *F.2d* 1039 (2d Cir. 1989) 14

Quezada v. County of Vernalillo, 944 *F.2d* 710 (10th Cir. 1991) 15

TABLE OF AUTHORITIES – Continued

Page

Russo v. City of Cincinnati, 953 *F.2d* 1036 (6th Cir. 1992) 19

Technitrol, Inc. v. Control Data Corp., 550 *F.2d* 992 (4th Cir. 1977), *cert. denied*, 434 *U.S.* 822, 98 *S.Ct.* 65, 54 *L.Ed.2d* 79 (1977) 19

Vizbaras v. Prieber, 761 *F.2d* 1013 (4th Cir. 1985) 8

Webb v. Hiykel, 713 *F.2d* 405 (8th Cir. 1983), *modified on other grounds*, 740 *F.2d* 500 (1984) 17

Wilson v. Meeks, 52 *F.3d* 1547 (10th Cir. 1995) 8

Yang v. Hardin, 37 *F.3d* 282 (7th Cir. 1994) 17

STATUTES AND RULES

Fed.R.Civ.P 56 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 9, 19, 21

OTHER AUTHORITIES

O'Connell, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?* 739 (1990) 58 **Fordham L. Rev.** 739 (1990) 16

$800,000 Wrongful Death Settlement, New Jersey Law Journal, Jan. 23, 1995, p.31 8

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PETITION FOR WRIT OF CERTIORARI

Petitioners, DR. BARBARA LEE PERLMUTTER, General Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 26, 1995.

OPINIONS BELOW

The Judgment Order of the Court of Appeals for the Third Circuit, for which review is sought, dated May 26, 1995, is reproduced in the Appendix, as is the order of the Court of Appeals denying a rehearing, dated July 12, 1995. The three decisions of the United States District Court for the District of New Jersey granting summary judgment (one of them dated November 18, 1993 and two of them dated June 7, 1994) are also reproduced in the Appendix. Also contained within the Appendix is a copy of the decision by the District Court denying reconsideration, dated August 23, 1994.

JURISDICTION

Judgment was entered by the Court of Appeals for the Third Circuit on May 26, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The relevant federal statutory and rule provisions are as follows:

42 U.S.C. § 1983 – Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed.R.Civ.P 56 –

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any

offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

As described below, this case involves the untimely and unnecessary death of a 23 year old woman, which could have only occurred as a result of suffocation caused by the excessive restraints placed upon her by respondents – "brutal" restraints, in the words of petitioners' medical expert. In a series of rulings below, summary judgment was granted in favor of all defendants, including the police defendants, who were dismissed upon a finding by the District Court that the "force" applied was reasonable under the circumstances.

On May 20, 1989, at approximately 1:00 a.m., the Bloomfield, New Jersey Police Department received a telephone call reporting a woman lying on the front lawn of an apartment building. A second call received a few minutes later advised that a woman had fallen through a plate-glass window of a basement apartment in that same building.

The woman who was the subject of the telephone calls was Petitioner's decedent, Ann Perlmutter ("Ann"). Ann was a petite woman, about five feet, three inches tall and slender, and was small enough to resemble a child. Ms. Sinauskas, the resident of the apartment into which Ann had fallen (or had been thrown), testified that, prior to the police officers' arrival, Ann had appeared confused, disoriented and seemed to wander around aimlessly. Ann was covered – hair, face, arms, and legs –

with her own blood, and left bloody handprints on the walls as she steadied herself while walking down the hall. Although Ann did not speak, Ms. Sinauskas understood by her gestures that she wanted to leave, and had gone to open the front door as the police arrived.

As the police officers entered the apartment, Ann, still dazed and apparently frightened, retreated to the rear of the apartment, and the police officers followed her into a bedroom.

Four police officers were present, followed only a few minutes later by two emergency squad members. Shortly thereafter, an additional two mobile intensive care unit members arrived. Thus the total number of police and rescuers present was eight. As mentioned, Ann was a petite woman who had obviously undergone recent trauma of some sort and appeared disoriented; she had no weapons and obviously lacked the ability to overpower the large group of persons on the scene.

The police officers testified that their initial efforts to talk to her to calm her down were unsuccessful, so they applied physical restraints "for her own safety". It is undisputed that the officers handcuffed Ann's arms behind her back, and then tied her legs together with a bedsheet, supposedly to prevent her from harming herself. The officers then took this obviously injured woman, laid her on her stomach on a "reeves stretcher", tightly fastened to her with three straps across her body, and then placed her and the stretcher on a wheeled cot, where additional straps were placed across her chest.

Ann was not arrested or charged with any offense; respondents have conceded Ann to have been a victim

rather than a suspect of any criminal activity. Yet, she remained brutally restrained for several minutes. When, as Ann was wheeled into the ambulance, the emergency workers finally discovered that she was in cardiac arrest, she was resuscitated; however, she died six days later as a result of massive brain damage, having never regained consciousness.

The amount of time that Ann was unconscious and in cardiac arrest was a hotly contested issue. Respondents' testimony was that she was resuscitated almost immediately after she "went quiet". However, petitioners' medical expert, Dr. Derby, states that the massive brain damage that Ann suffered must have been caused from a period of asphyxiation lasting no fewer than seven minutes, and possibly over ten minutes. The minor bruise that the autopsy revealed was not capable of causing the massive destruction of brain tissue, and the blood tests performed upon her when she arrived at the hospital did not reveal any drugs or intoxicants that could have caused such damage. Simply stated, Ann's body was compelling evidence that she had been suffocated and allowed to suffer irreversible and fatal brain damage as a result of the respondents' conduct.

Petitioners' medical expert, Dr. Derby, has said that the combination of straps across Ann's body, together with the blanket that was also placed along her, severely restricted Ann's ability to expand her chest, and thus prevented her from breathing. This condition was further aggravated by the continued binding of Ann's hands and legs behind her back, placing her in a position which by

itself interfered with her ability to expand her chest, and in fact constituted a *per se* risk to life.[1]

As Dr. Derby further stated in his report, respondents failed to follow any of the elementary safety guidelines to which one must adhere following such a relentless impediment of a person's respiration for several minutes. For example, there was no observation of Ann's face; nor did respondents monitor the pulse every 30 seconds (as they should have); nor did they check if the patient was constantly breathing. In order to be able to see if breathing is occurring, which is crucial, the technician has to stay right next to, attempt to talk to, and look in the face of, the victim on the stretcher at all times.

Furthermore, as petitioners' police expert, Mr. diGrazia, has stated, the officers' decision to place Ann on a reeves stretcher after she had already been "hog-tied" to such an extent was far beyond any reasonable use of force that could ever have been appropriate, considering her size and ominously imperiled medical condition.

The District Court (and apparently, the Court of Appeals as well) overlooked the evidence presented by

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[1] Such "positional asphyxiation" has been reported in several circumstances where persons in police custody died as a result of the application of physical restraints. *See, Wilson v. Meeks*, 52 *F.3d* 1547, 1550 (10th Cir. 1995), *Vizbaras v. Prieber*, 761 *F.2d* 1013, 1015 (4th Cir. 1985), *$800,000 Wrongful Death Settlement*, New Jersey Law Journal, Jan. 23, 1995, p.31, *Dead Man's Family Files Federal Suit Alleging Brutality by County Police*, Baltimore Sun, Jan. 1, 1995, p. 5C., *Daughter's Jail-Cell Death Prompts Suit*, News & Record (Greensboro, N.C.), July 22, 1994, p. B1.

petitioners, and did not address any of the material in the record demonstrating the unreasonableness of the restraints applied to Ann. Thus, the record clearly demonstrated, at a minimum, the existence of a triable jury issue.

PROCEDURAL HISTORY

On May 16, 1991, petitioners filed a Complaint in the United States District Court for the District of New Jersey. The complaint alleged that the police officers, as well as ambulance and medical personnel had wrongfully deprived Ann of her civil rights (by taking her life) and demanded relief under, *inter alia*, 42 U.S.C. § 1983.

After two years of discovery, the District Court (John W. Bissell, U.S.D.J.) granted summary judgment in favor of certain defendants (associated with the Bloomfield Volunteer Emergency Squad). The opinion and accompanying order were signed on November 18, 1993.

After several other defendants moved for summary judgment, the District Court issued two companion opinions on June 7, 1994. In the first opinion, summary judgment was granted to the defendant police officers. In the other opinion, summary judgment was granted to the remaining defendants (associated with the Mobile Intensive Care Unit).

On August 23, 1994, the District Judge summarily rejected petitioners' motion to reconsider, despite the considerable expert testimony and other evidence that was submitted by petitioners' substituted counsel.

On September 20, 1994, petitioners filed a notice of appeal to the United States Court of Appeals to the Third Circuit. The matter was extensively briefed by all parties. Indeed, recognizing the importance of this case, the Court of Appeals requested additional legal argument by the parties regarding two recent decisions from that Circuit. The supplemental material was supplied. On May 26, 1995, the Court of Appeals affirmed the District Court's earlier opinions via a single page judgment order which simply adopted the reasoning expressed by the District Court.

On July 12, 1995, the Third Circuit denied petitioners' motion for rehearing, and the instant petition resulted.

LEGAL ARGUMENT

POINT I

CERTIORARI SHOULD ISSUE SO THAT THIS COURT MAY CLARIFY THE AMBIGUITIES THAT EXIST IN APPLYING ITS RULING IN *GRAHAM v. CONNOR* WITH REGARD TO WHETHER "OBJECTIVE REASONABLENESS" IS ORDINARILY A JURY QUESTION.

The District Court, in determining by motion that the force used by respondent police officers was not excessive as a matter of law, misapplied the standard of "objective reasonableness" announced by this Court in *Graham v. Connor*, 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.2d* 443 (1989).

The facts in *Graham* are similar, yet significantly less compelling than those of the present case. A police officer

observed Graham acting erratically, having rapidly entered and exited a store before entering a friend's car. The officer stopped the car, and was advised at that time by the driver that Graham was a diabetic and was experiencing "sugar shock". Graham subsequently exited the car and briefly lost consciousness. 490 *U.S.* at 389, 109 *S.Ct.* at 1868.

Several police officers responded to the scene, and, believing that Graham was drunk, handcuffed his hands behind his back, carried him to the police car and threw him in head-first. Upon learning that Graham had done nothing wrong at the store, the officers then drove him home and released him. Graham suffered a broken foot, cuts on the wrists, a bruised forehead, and a persistent ringing in the ear as a result of his treatment at the hands of the police. 490 *U.S.* at 390, 109 *S.Ct.* at 1868.

Graham brought suit, claiming that police officers used "excessive force" in detaining him. The District Court granted a directed verdict in favor of the defendants, ruling (1) that Graham suffered no discernable injury, and that (2) the police officers acted without malice. A divided Circuit Court affirmed. *Id.*

This Court reversed. The Court ruled that "excessive force" cases arising out of an "arrest, investigatory stop, or other 'seizure' of a free citizen" should be analyzed under the objective reasonableness standard of the Fourth Amendment. 490 *U.S.* at 395, 109 *S.Ct.* at 1871. Under this standard, the intent of the police officer is irrelevant; there is no need, therefore, to show that the officer acted with malice or the specific intent to inflict pain. The standard, which requires the court to balance the nature

and quality of the intrusion upon the individual's Fourth Amendment interests against the countervailing governmental interests at stake, requires "**careful attention to the facts and circumstances of each particular case**, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or is attempting to evade arrest by flight." 490 *U.S.* at 396, 109 *S.Ct.* at 1871-1872. (emphasis added). This Court remanded the case for reconsideration under the proper Fourth Amendment standard.

Graham applies *a fortiori* to the facts of this case. Like in *Graham*, Ann Perlmutter had not, in fact, committed a crime and was nevertheless made a victim of excessive force by police officers. But more seriously, Ann was restrained far more severely than Graham had been – to the point where she could no longer breathe. And unlike in *Graham*, the victim is no longer here to sue on her own behalf, due to the fatal injuries that she sustained in the cruel assault upon her by respondents.

Interestingly, in *Graham*, the plaintiff received relatively minor injuries, but Ann lost her life even though there is nothing to suggest that she posed a danger to the officers or anyone else. In this regard, the respondents' claim that they restrained Ann to "protect" her from injuring herself could never have justified an entry of summary judgment, especially where petitioners' experts have opined that Ann's death can only be explained by the tightening restraints to such a degree that she could not breathe. This case is far removed from that of the fleeing felon with a gun as to which the use of deadly force may be permitted; yet such deadly force was indeed

used here where respondents bound Ann so tightly that she was simply unable to breathe.

A. The Decision Below is Sharply Contrasted by Decisions in Other Circuits, Which Hold that "Reasonableness" is an Issue of Fact, not One of Law.

The District Court's decision, as affirmed by the Third Circuit, is in direct conflict with the decisions from other circuits. As set forth below, numerous circuits have held that the issue of "objective reasonableness" must be decided by the finder of fact. It is respectfully submitted that those decisions represent the proper interpretation of this Court's holding in *Graham*, and the Third Circuit's approach represents a dangerous departure thereof, necessitating review by this Court.

The Ninth Circuit stated in *Hammer v. Gross*, 932 *F.2d* 842, 846 (9th Cir. 1991), "in light of all these considerations, and of the fact that 'the integrity of an individual's person is a cherished value of our society', we conclude that the question of the reasonableness of force applied by the defendants in the circumstances of this case was properly one for the jury." (quoting *Schmerber v. California*, 384 *U.S.* 757, 86 *S.Ct.* 1826, 16 *L.Ed.2d* 908 (1966)). The Ninth Circuit's view was reiterated in *Chew v. Gates*, 27 *F.3d* 1432, 1443 (9th Cir. 1994), "because questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury."

In determining that a jury trial was necessary to determine the question of reasonableness, the *Chew* court

ruled that the first prong of the *Graham* test – the severity of force applied – strongly outweighed the risk of harm to the police or others as well as the possibility of flight by the victim. "[Applying *Graham*] would not have required a rational jury to decide that using [a police dog] to apprehend him was reasonable." *Chew* at 1441. "Moreover, the district court's decision to take the excessive force question away from the jury conflicts with circuit law". *Id.*

In *Calamia v. City of New York*, 879 *F.2d* 1025 (2d Cir. 1989), the Second Circuit applied *Graham* to a case in which the suspected burglar was arrested by being shoved in the chest, thrown onto the floor, turned over and handcuffed extremely tightly behind his back for five or six hours. *Id.* at 1029. In applying the "objective reasonableness" standard, the Court said "**it was for the jury to determine** whether Sutton's conduct in connection with the arrest, pushing Calamia to the floor and causing him to remain there in a painful posture without circulation in his hand for many hours while the officers collected the property was, as an objective matter reasonable." *Id.* at 1035. (Emphasis added). Thus, the Second Circuit agrees with the Ninth Circuit's view that "objective reasonableness" is a jury question.[2]

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[2] In the context of a directed verdict motion, the Second Circuit was emphatic that the question of the reasonableness of a police officer's use of force belonged with the jury, and, applying the *Graham* test, ruled that the district court had erred in directing a verdict against the plaintiff. *Powell v. Gardner*, 891 *F.2d* 1039, 1044 (2d Cir. 1989) ("[The trial court, by directing a verdict in favor of police officers] improperly ruled on the basis of its own assessment of the weight of the evidence, rather than

Similarly, the Tenth Circuit ruled in *Quezada v. County of Vernalillo*, 944 *F.2d* 710, 715 (10th Cir. 1991) that "whether the police used excessive force in a § 1983 case has always been seen as a factual inquiry best answered by the fact finder." The Eleventh Circuit, in a pre-*Graham* decision, has similarly ruled. *Fitzgerald v. McDaniel*, 833 *F.2d* 1516, 1518-19 (11th Cir. 1987) ("whether [defendant's] use of deadly force under these circumstances was reasonable was a question for the jury"). *See also, Melear v. Spears*, 862 *F.2d* 1177, 1184 n.7 (5th Cir. 1989) ("As the trier of fact, the jury could properly determine the reasonableness of [the police officer's] actions after being instructed according to the [applicable standard]").

In sum, several circuits have held that the *Graham* decision militates strongly in favor of a jury determination of the reasonableness of the force used by police officers. Thus the Third Circuit's affirmance of a judge's summary findings in this regard demonstrated a significant distancing from that reasoned policy. The Third Circuit holds that it is the province of the trial court to decide, on a motion for summary judgment, whether the force exhibited by police was "objectively reasonable".[3]

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viewing the evidence in the light most favorable to Powell"). *See also, McDowell v. Rogers*, 863 *F.2d* 1302, 1307 (6th Cir. 1988) ("a trial court is not entitled to weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the jury.").

[3] Apparently, the courts below rejected a Third Circuit decision involving a similar factual setting where a plaintiff was subjected to physical force by police for unusual (but not criminal) behavior. In *Janicsko v. Pellman*, 774 *F.Supp.* 331, 342 (M.D.Pa. 1991), *aff'd*, 970 *F.2d* 899 (3d Cir. 1992), the district

Besides the obvious conflict with other circuits that this poses, the Third Circuit has ruled contrary to the literal meaning and spirit of *Graham*, which, we respectfully submit, was never intended to be applied in this manner. *See*, O'Connell, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?*, 58 **Fordham L. Rev.** 739, 740 n.10 (1990) ("Although Graham did not explicitly state whether the question of 'objective reasonableness' was for the judge or jury, this inquiry is presumably for the jury.").

The instant case was certainly a matter for the jury, considering (i) the force applied – excessively strapping Ann to the stretcher to the point where she suffocated – (ii) Ann's actions, although unusual, presented no real risk of injury to the police and other persons present, (iii) there was nothing demonstrating an attempt to flee.

While petitioners' certainly acknowledge that in any given factual setting, there may not be a "hard and fast" rule governing the extent of reasonable uses of force, it is respectfully submitted that under these facts, a careful review of the entire record would support a finding of an "unreasonable" use of force. The instant facts are similar to those in *Brisk v. City of Miami*, 726 *F.Supp.* 1305 (S.D.Fla. 1989). There, plaintiff was pulled over by police officers who handed him a citation (without cause, according to plaintiff) and following an argument, was beaten and "hog-tied" by police officers. Plaintiff turned blue and

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court, facing differing versions of the alleged incident, ruled that the issue of "whether that force was excessive, is an issue for the finder of fact" thereby precluding summary judgment on the issue.

stopped breathing. On a motion to dismiss on qualified immunity grounds, the court ruled that the issue should be decided by a jury, because, the issue of whether qualified immunity applied depended upon the reasonableness of the use of force, which was the jury's role. *Id.* at 1313.

Naturally, in the instant case, where the District Court had based the finding of "undisputed facts" solely on the police testimony and where the victim is no longer able to testify on her own behalf due to her death, there is even more reason for a court to resist its temptation to "clean its docket" by summarily dismissing a case. Rather, the prevailing – and correct – view, yields to the jury for decision on these issues. Summary judgment should only be tolerated when there is truly an absence of triable issues of material fact, after honestly drawing all inferences in favor of the non-moving party pursuant to the standard of Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 255, 106 *S.Ct.* 2505, 2513, 91 *L.Ed.2d* 202 (1986).

Moreover, even assuming, *arguendo*, that some of the respondents (police or ambulance personnel) were not personally involved in the unlawful assault upon Ann, the law in most circuits has been to impose § 1983 liability for "standing by" while other officers "summarily punish" a third person within his or her presence or knowledge. *Yang v. Hardin*, 37 *F.3d* 282, 285 (7th Cir. 1994). *See also, Gagnon v. Ball*, 696 *F.2d* 17, 21 (2d Cir. 1982) (officer liable for failing to prevent false arrest), *Byrd v. Clark*, 783 *F.2d* 1002, 1007 (11th Cir. 1986) (court must inquire into whether police officer had opportunity to intervene during another officer's beating of plaintiff), *Webb v. Hiykel*, 713 *F.2d* 405, 408 (8th Cir. 1983), *modified on*

other grounds, 740 *F.2d* 500 (1984) (imposing liability upon officer for failing to intervene, even though officers using excessive force were his superiors), *Bruner v. Dunaway*, 684 *F.2d* 422, 426 (6th Cir. 1982), *cert. den.*, 459 *U.S.* 1171, 103 *S.Ct.* 816, 74 *L.Ed.2d* 1014 (1983) ("acts of omission are actionable in [§ 1983 cases involving the excessive use of force] to the same extent as are acts of commission.").

It should also be noted that the terse, judge-issued dismissal typified the harsh treatment that has been afforded petitioners' attempts to bring justice to this matter. Examples of this treatment included: (a) no legitimate explanation from the pertinent authorities following the tragedy; (b) no more than summary dismissal of all claims given by the federal tribunal, including on reconsideration, without any reasoned consideration of the most significant evidence (certainly none expressed in any opinion), thus depriving the aggrieved family of its "day in court"; and (c) the absence of a reasoned decision on appeal. This at least gives rise to the perception of injustice.

Consequently, it is respectfully submitted that this Court grant a Writ of Certiorari to both settle this conflict and to clarify the application of its prior decision of *Graham v. Connor*.

POINT II

CERTIORARI SHOULD ISSUE SO THAT THIS COURT CAN SETTLE THE APPARENT CONFLICT AMONG THE CIRCUITS REGARDING THE NECESSITY FOR A COURT TO CAREFULLY REVIEW EXPERT TESTIMONY IN § 1983 MATTERS INVOLVING POLICE MISCONDUCT.

The District Court was required to review all of the affidavits, exhibits and other evidence presented by the parties when deciding the motion for summary judgment. In its opinions, the court did not even recognize the existence of petitioners' expert witnesses and their affidavits, let alone review their contents. Yet, the experts illustrated that the conduct engaged in by the respondent police officers was, in fact, unreasonable under the circumstances. This is especially wrong, given the nature of this case.

Contrasting the Third Circuit's ruling on this issue, the Sixth Circuit has forcefully ruled otherwise. "To disregard expert testimony in [§ 1983] cases would, we believe, carry with it the danger of effectively insulating a municipality from liability for injuries resulting directly from its indifference to the rights of its citizens." *Russo v. City of Cincinnati*, 953 *F.2d* 1036, 1047 (6th Cir. 1992).

The Fourth Circuit has also emphasized the importance of carefully reviewing **both sides'** experts on a motion for summary judgment. "[W]here there is conflicting evidence before the court, . . . disposing of the issue on motion [by adopting the evidence of one party and disregarding the expert testimony of the other] on motion for summary judgment, is not proper." *Technitrol, Inc. v.*

Control Data Corp., 550 *F.2d* 992, 997 (4th Cir. 1977), *cert. denied*, 434 *U.S.* 822, 98 *S.Ct.* 65, 54 *L.Ed.2d* 79 (1977).

The value of expert testimony in excessive force cases was particularly discussed by the Fourth Circuit in *Kopf v. Skyrm*, 993 *F.2d* 374 (4th Cir. 1993), wherein the court ruled that the exclusion of the plaintiff's expert on police procedures (coincidentally, Robert diGrazia, petitioners' expert herein) was an abuse of discretion requiring reversal. The *Kopf* Court explained:

> As a general proposition, the "objective reasonableness" standard may be comprehensible to a lay juror. On the other hand, any "objective" test implies the existence of a standard of conduct, and, where the standard is not defined by the generic – a reasonable person – but rather by the specific – a reasonable officer – it is more likely that Rule 702's line between common and specialized knowledge has been crossed.
>
> The district court seems to have deduced a blanket rule that expert testimony is generally inappropriate in excessive force cases . . . To the contrary, expert testimony has often been admitted in such cases. [citations omitted]. Nonetheless, a blanket rule that expert testimony is generally admissible in excessive force cases would be just as wrong as a blanket rule that it is not.
>
> The facts of every case will determine whether expert testimony would assist the jury. Where force is reduced to its most primitive form – the bare hands – expert testimony might not be helpful. Add handcuffs, a gun, a slapjack, mace, or some other tool, and the jury may start

> to ask itself: what is mace? what is an officer's training on using a gun? how much damage can a slapjack do? Answering these questions may often be assisted by expert testimony.

993 *F.2d* at 378. diGrazia's testimony in the instant matter clearly would have been of great assistance to the finder of fact in light of the lay person's general unfamiliarity with the methods for dealing with disoriented, noncommunicative persons with undefined medical problems, or the use of specific types and levels of restraints in defined circumstances.

A review of the District Court's opinions – affirmed by the Court of Appeals – reveals a complete disregard for these precepts. The District Court adopted the factual contentions of the defendants (*i.e.*, the **moving parties**), without even commenting on the substantial evidential submissions presented by the plaintiffs. No mention was made of the expert testimony proffered by the plaintiffs which clearly set forth a prima facie case of excessive force; shockingly, in the opinion denying plaintiffs' motion for reconsideration, the court recognized that plaintiffs were urging it to consider the reports but failed to even mention the experts' proffered testimony thereafter.

The Third Circuit's acquiescence of the trial court's refusal to consider petitioners' expert reports runs against the opinions of the Courts of Appeals for several circuits. Thus, it is respectfully urged that this Court speak on the subject to clarify the law on expert testimony in § 1983 cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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West Orange, New Jersey 07052

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5579

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and DR. BARBARA LEE PERLMUTTER, Individually,

Appellant

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MCNIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; BLOOMFIELD VOLUNTEER EMERGENCY SQUAD; AMBULANCE ATTENDANT DAVIS, Individually and as attendant of the Mountainside Hospital Mobil Intensive Care Unit (MICU aka Med VII): DAN MACMAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka MED

VII); JOHN DOE III, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); MOUNTAINSIDE HOSPITAL
(Caption amended per the Clerk's 10-21-94 order)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-cv-02140)
District Judge: Hon. John W. Bissell

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 23, 1995

Before: COWEN, ROTH and ALDISERT, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 25, 1994, be and is hereby affirmed substantially for the reasons set forth by Judge Bissell in his opinion dated August 23, 1994. Costs taxed against appellant.

ATTEST:

/s/ P. Douglas Sisk,
Clerk
Dated: May 26, 1995

By the Court,

/s/ Robert E. Cowen
CIRCUIT JUDGE

Costs taxed in favor of Appellees, Michael Cooper, Robert Hochstuhl, Priolo and Behre as follows:

Appendix	$437.60
Brief	$ 99.00
TOTAL COSTS	$536.60

Certified as a true copy and issued in lieu of a formal mandate on July 20, 1995.

Teste: /s/ P. Douglas Sisk

Clerk, U. S. Court of Appeals for the Third Circuit.

NOT FOR PUBLICATION

UNITED STATES
DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF

Civil Action No. 91-2140

OPINION

THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

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BISSELL, *District Judge*

The action, filed on May 16, 1991, involves purported claims under 42 U.S.C. §§ 1983 and 1985, accompanied by state law tort claims. The death of Ann Perlmutter, the administratrix's daughter ("plaintiff"), subsequent to her

contacts with the Bloomfield Police, the Bloomfield Volunteer Emergency Squad ("BVES"), and the Mountainside Hospital Mobile Intensive Care Unit ("Mountainside Unit"), prompted the bringing of this suit. Defendants BVES and its members Frederick Menzel and Andrew Depczek have moved for summary judgment. They will sometimes be referred to hereafter collectively as "the BVES defendants." The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

FACTS

Ann Perlmutter died on May 26, 1989 as a result of an incident that occurred on May 20, 1989. (Noto Cert., ¶ 2). BVES, Frederick Menzel and Andrew Depczek became involved in the May 20th matter when BVES received a "dispatch" claiming a woman was "down" on the lawn in front of 165 Franklin Street, Bloomfield. (Defendants' Br. at 1). 165 Franklin Street was the residence of Ann Perlmutter. (Noto Cert., ¶ 1).

Carrying out their duties as members of BVES, Menzel and Depczek arrived on the scene and were directed to a basement apartment of the building. (Defendants' Br. at 1; Noto Cert., ¶ 4). They were told a woman had allegedly crashed through the resident's window. (*Id.*) The defendants observed four policemen holding down Ms. Perlmutter as they entered the apartment. (Moore Cert., Exh. A; Plaintiff's Br., Exh. B at 30).

As Menzel and Depczek began treatment of Ms. Perlmutter, she began thrashing her arms and kicking her legs. (Noto Cert., ¶ 5). The police officers then handcuffed Ms. Perlmutter's arms behind her back and tied

her legs together with a bed sheet. (*Id.*, ¶ 5). Ms. Perlmutter placed "face down" on a stretcher by the police, was strapped to it by the defendants. (Plaintiff's Br., Exh. B at 49-51).[1]

After carrying her out of the apartment, Menzel and Depczek strapped Ms. Perlmutter to a rolling cot, "face down" again. (Noto Cert., ¶¶ 9-11). The two Squad members noticed Ms. Perlmutter had become "totally quiet" and observed she had stopped breathing when they arrived at the ambulance. (*Id.*, ¶ 12). They immediately removed the handcuffs and restraining straps. (Plaintiff's Br., Exh. B at 57-58).

The Mountainside paramedics and the BVES members then turned Ms. Perlmutter over and began medical treatment to try to revive her. (*Id.*)[2] Upon arrival at the hospital, the medical treatment in the ambulance had revived a heartbeat but not breathing. (*Id.*) Ann Perlmutter never regained consciousness and died on May 26, 1992. (Noto Cert., ¶ 15). A toxicology report showed residue of cocaine in her blood. (Defendants' Br. at 3). The expert reports dispute the cause of her death.

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[1] "Face down" was defined as on her stomach with her head to the side. (Plaintiff's Br., Exh. A; Exh. B at 50).

[2] The exact medical treatment upon noticing her "totally still" is as follows:

> One of us checked for a pulse. Found no pulse. One of us were probably at the same time undoing the straps and I took her handcuffs off. We started CPR, bag valve mask and started chest compressions. The medics hooked her up to telemetry. I believe she was also intubated.

(Plaintiff's Br., Exh. B at 58).

ANALYSIS

I. Standard of Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987).

In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that in applying the criteria for granting summary judgment,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors

> could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*) In opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must produce sufficient evidence to reasonably support a jury verdict in its favor. (*Id.* at 249).

Plaintiff, by her own admission, is suing the BVES defendants under the Fifth, Eighth and Tenth Counts. (Plaintiff's Br. at 2). Thus, they are not defendants in the Fourth Count, the only Count that is expressly predicated upon 42 U.S.C. § 1983. That Count is based upon "[t]he actions taken by the defendant police officers." (Compl., Fourth Count, ¶ 2). In the Fifth Count, the BVES defendants are charged as co-conspirators with other defendants pursuant to 42 U.S.C. § 1985.[3] No § 1983 liability is alleged against the BVES defendants in the complaint. By long-standing judicial construction, a § 1985 claim may only be maintained where the plaintiff can show that " 'some racial or otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action.' " *Bray v. Alexander Clinic*, ___ U.S. ___, 122 L. Ed. 2d 34, 45 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). No such allegations appear anywhere

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[3] Presumably this reference is to § 1985(3) because parts (1) and (2) of § 1985 are not even arguably applicable here.

within the complaint. Accordingly, summary judgment for the BVES defendants on the Fifth Count is in order.

The Eighth Count charges the BVES defendants with negligence, gross negligence and intentional, malicious and/or reckless conduct in handling plaintiff's decedent. This is a claim only against the BVES defendants, predicated only on state law. Accordingly, it is before the Court only pursuant to pendent jurisdiction. In the sound exercise of its discretion, the Court will dismiss that Count, for lack of pendent jurisdiction, now that summary judgment has been granted on the only federal claim asserted against the BVES defendants. *United Mine Workers v. Gibbs,* 338 U.S. 715, 726 (1966).

The Tenth Count, in essence, asserts a *Monnell* claim against the alleged public entity defendants, including BVES. *See Monnell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). Critical to a *Monnell* claim against an agency employing one or more charged individuals is an underlying *bona fide* civil rights claim against such individuals. For the reasons stated immediately above, that is not the case. Without an underlying § 1985 claim (or a § 1983 claim) against the defendants Menzel and Depczek, no such claim may be made against BVES under *Monnell.*

Alternatively, while a *§ 1985* claim can be asserted against a party who is not a "state actor," a state actor is required for a *§ 1983* claim. Assuming, *arguendo,* that the Tenth Count seeks to assert against BVES a *Monnell* claim with a § 1983 underpinning, summary judgment must be awarded to that defendant because it is not a state actor within the contemplation of § 1983.

The defendants accurately assert that they are not sufficiently connected with the Township of Bloomfield or any of its agencies to subject the BVES or any of its members to 42 U.S.C. § 1983 liability. (Defendants' Br. at 5). To establish civil liability under 42 U.S.C. § 1983, a plaintiff must initially prove:

> (1) the conduct complained of was committed by a person acting under the color of state law; and
>
> (2) this conduct deprived the injured of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor, 451 U.S. 527, 532 (1981).

The primary issue thus becomes did BVES as an organization and its members act "under the color of state law." *McKinney v. West End Voluntary Ambulance Association,* 821 F. Supp. 1013, 1016 (E.D. Pa. 1992). The "under the color of state law requirement" is treated the same as the "state action" requirement of the fourteenth amendment. (*Id.*, citing *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937 (1982)).

The purpose of the state actor requirement is to "assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." (*Id.*, citing *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982)). The balance intended to be struck is "to preserve individual freedoms by limiting the reach of federal law and federal and judicial power and avoid imposing on the State, its agencies or officials, responsibility for conduct for which

they cannot be fairly blamed." (*Id.*, citing *Lugar*, 457 U.S. at 936).

The Supreme Court has never defined the exact parameters of state action. *Community Med. Center v. Emergency Med. Services*, 712 F.2d 878, 880 (3d Cir. 1983). The Court has stated that:

> only by sifting through the facts and weighing circumstances can the less than obvious involvement of the state in private conduct be attributed its true significance.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

The Third Circuit has addressed this issue in a matter similar to the case at bar. *Community Med. Center v. Emergency Med. Services*, 712 F.2d 878 (3d Cir. 1983). In *Community Med. Center*, the defendant was a private, not-for-profit corporation that received grants from both the State of Pennsylvania and the U.S. Department of Health and Human Services. (*Id.* at 879). Emergency Med. Services' purpose was to coordinate emergency health care services in northeastern Pennsylvania. (*Id.*) The Pennsylvania Secretary of Health had designated Emergency Med. Services the lead agency for emergency medical service development in a five-county region. (*Id.*) The dismissal of the 42 U.S.C. § 1983 matter brought against Emergency Med. Services was affirmed because the Circuit determined that the not-for-profit corporation was not a state actor. (*Id.*)

Bloomfield Volunteer Emergency Squad is a private not-for-profit corporation organized under New Jersey law. (Karosen Cert., ¶ 2; Exh. A). Control of the Squad

rests with a board of trustees while the captain of the Squad and his assigns run the day-to-day operations. (*Id.*, ¶¶ 3, 4; Exh. B). The Squad rents space from the municipality for a nominal cost and owns its own equipment. (*Id.*, ¶ 5). This is done under a statutory grant of propriety. N.J.S.A. 40A:12-14, 15.

BVES does share the same dispatch service with the city services, but, as expounded in *McKinney*, that is not a sufficient nexus to make the BVES members state actors. *McKinney*, 821 F. Supp. at 1015. Nor should the letterhead for ambulance call reports cumulatively with the dispatch ties and the lease agreement create the sufficient nexus.[4] *Lugar*, 457 U.S. at 936. The BVES members are private citizens volunteering their own time, with money they raise and equipment they own. (Karosen Cert., ¶ 5).

The decisive inquiry in determining whether BVES is a state actor in light of its private status becomes: is "such a function traditionally the exclusive prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). The plaintiff has not brought forward any evidence that emergency services are traditionally a function of the state. Furthermore, numerous other courts have found that ambulance/emergency services are not traditionally functions of the state. *See McKinney*, 821 F. Supp. at 1018; *Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770, 773 (D. Md. 1984); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 596 F. Supp. 1344, 1350-51 (E.D. Va.

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[4] The ambulance call report has a heading "Bloomfield Police Department" with a subheading of "BVES Ambulance Call Report." (Plaintiff's Br., Exh. H).

1983). Therefore, BVES and its members are not state actors.

Finally, to the extent that the Tenth Count could be construed as an effort to state a claim under state law, as well as under *Monnell*, it too must be dismissed for lack of pendent jurisdiction. While that Count, as pleaded, is being dismissed with prejudice on each of the two grounds discussed above, this Court offers no opinion as to whether a claim under state law could be maintained against that defendant in the courts of New Jersey.

CONCLUSION

For the reasons set forth above, the Fifth and Tenth Counts against the defendants F. Menzel, A. Depczek and the Bloomfield Volunteer Emergency Squad are being dismissed, with prejudice, on summary judgment for these defendants. The Eighth Count is dismissed, without prejudice, for lack of pendent jurisdiction. No further claims remain pending against those three defendants.

/s/ John W. Bissell
JOHN W. BISSELL
United States
District Judge

DATED: November 18, 1993

UNITED STATES
DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD;

Civil Action No. 91-2140

ORDER

THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 18th day of November, 1993,

ORDERED that the motion of defendants Bloomfield Volunteer Emergency Squad, F. Menzel and A. Depczek for summary judgment on the Fifth and Tenth Counts of plaintiff's complaint be and it hereby is granted, and the

Fifth and Tenth Counts are hereby dismissed, with prejudice as to those defendants; and it is further

ORDERED that Count Eight of plaintiff's complaint be and it hereby is dismissed, without prejudice, for lack of pendent jurisdiction.

/s/ John W. Bissell
JOHN W. BISSELL
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,	Civil Action No. 91-2140
Plaintiff,	**OPINION**
v.	
MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL,	

Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

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BISSELL, District Judge

This action, filed on May 16, 1991, involves federal civil rights claims accompanied by state law negligence claims. The death of Ann Perlmutter, the administratrix's daughter ("plaintiff"), while under the supervision of the Bloomfield Police, the Bloomfield Volunteer Emergency Squad ("BVES"), and the Mountainside Hospital Mobile Intensive Care Unit ("Mountainside Unit") prompted the bringing of this suit.

On November 18, 1993, this Court granted summary judgment to defendants BVES and its two members, Frederick Menzel and Andrew Depczek. These three parties were named in the Fifth, Eighth and Tenth Counts of

plaintiff's Complaint. The Fifth Count charged a conspiracy with other defendants to violate 42 U.S.C. § 1985. The Eighth Count charges BVES and its members with negligence. The Tenth Count alleges a breach of the plaintiff's constitutional rights pursuant to *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

Mountainside Hospital Mobile Intensive Care Unit, Attendant Davis and Dan MacMahon ("Mountainside defendants") have brought a motion for summary judgment. The Mountainside defendants are named in the Fifth, Ninth and Eleventh Counts of plaintiff's Complaint. As stated above, the Fifth Count charges a conspiracy to violate 42 U.S.C. § 1985. The Ninth Count alleges that the Mountainside defendants committed medical malpractice. A breach of the plaintiff's constitutional rights pursuant to *Monnell* is alleged in the Eleventh Count. *See Monnell*, 436 U.S. 658 (1978). This motions [sic] is today being granted as reflected in a separate Opinion.

Presently, defendants Michael Cooper, Robert Hochstuhl, Charles Priolo and Michael Behre ("police officers") have brought this motion for summary judgment. Claims against the police officers are asserted in the First, Second, Third, Fourth and Fifth Counts of plaintiff's Complaint. The First Count alleges a wrongful death claim pursuant to N.J.S.A. 2A:31-1. The Second Count alleges that a cause of action exists against the police officers pursuant to New Jersey's survival action statute, N.J.S.A. 2:15-3. The Third Count alleges that the police officers' wrongful acts deprived Dr. Barbara Perlmutter of support and companionship of her daughter, the decedent Ann Perlmutter. The Fourth Count alleges that the police offices [sic] violated the plaintiff's civil rights,

creating a claim pursuant to 42 U.S.C. § 1983. The Fifth Count alleges that the police officers conspired to deprive the plaintiff of her civil rights, violating 42 U.S.C. § 1985.

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

FACTS

Ann Perlmutter died on May 26, 1989 as a result of an incident that occurred on May 29 [20], 1989. All of the defendants were brought into contact with the plaintiff decedent when she crashed through the window of Julia Sinauskas' basement apartment at 165 Franklin Street, Bloomfield, New Jersey on May 29 [20], 1989. (DiSomma Cert., Exh. F, Tr. 31:16-33:2). Ann Perlmutter resided at 165 Franklin Street as well. (*Id.*)

In response to the incident, the police officers, the BVES and the Mountainside Unit were dispatched to 165 Franklin Street. (*Id.*, Exh. D, Tr. 14:17-15:24). The police officers arrived at the scene first. (*Id.*) The BVES volunteers, Menzel and Depczek, were next to arrive. They were directed to a basement apartment of the building where they were told a woman had crashed through the resident's window. (*Id.*)

Ann Perlmutter was the woman who had crashed through the resident's window. When Menzel and Depczek initiated treatment of Ms. Perlmutter, she immediately began to thrash her arms and legs. (*Id.*, Exh. L, Tr. 24:20-25:11). The police officers responded by handcuffing Ms. Perlmutter's arms behind her back and tying her legs together with a bed sheet. (*Id.*) The police then

placed Ms. Perlmutter "face down" on a stretcher. (*Id.*, Exh. D, Tr. 37:20-38:10).[1] Menzel and Depczek strapped her to the stretcher. (*Id.*) The decedent continued to move and yell while she was being removed on the stretcher. (*Id.*, Exh. F, Tr. 50:5-13; Exh. G, Tr. 90:16-20; Exh. J, Tr. 63:15-20; Exh. H, Tr. 49:22-50:7).

The Mountainside defendants, in their capacity as Mountainside Hospital Intensive Care Unit Paramedics, were the last to arrive. (*Id.*, Exh. L, Tr. 23:10-24:18). While the plaintiff was being restrained and moved out of the apartment, the Mountainside defendants retrieved the medical equipment and put it into the BVES ambulance. (*Id.*)

After carrying her out of the apartment, the BVES volunteers strapped Ms. Perlmutter to a rolling cot, "face down" again. (*Id.*) As they wheeled the plaintiff to the ambulance, Menzel and Depczek noticed that Ms. Perlmutter had become "totally quiet." (*Id.*, Exh. H. Tr. 55:25-56:7). Upon closer examination, the BVES volunteers observed that she was not breathing. (*Id.*) They immediately removed the handcuffs and restraining straps. (*Id.*) The Mountainside paramedics and the BVES members then turned Ms. Perlmutter over and began medical treatment to try to revive her. (*Id.*)[2]

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[1] "Face down" was defined as on her stomach with her head to the side. (DiSomma Cert., Exh. H, 50:2-7).

[2] The exact medical treatment upon noticing her "totally still" is as follows:

> One of us checked for a pulse. Found no pulse. One of us were probably at the same time undoing the straps and I took her handcuffs off. We started CPR, bag

While traveling to the hospital, the medical treatment in the ambulance revived Ms. Perlmutter's heartbeat but not her breathing. (*Id.*) Ann Perlmutter never regained consciousness. (*Id.*, Exh. E, Tr. 39:25-41:24). She died on May 26, 1989. (*Id.*) A toxicology report showed the residue of cocaine in her blood. (*Id.*, Exh. F, Tr. 31:16-33:2).

ANALYSIS

Standard of Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987).

In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

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valve mask and started chest compressions. The medics hooked her up to telemetry. I believe she was also intubated.

(DiSomma Cert., Exh. H, 58:12-19).

The Supreme Court has stated that in applying the criteria for granting summary judgment,

> the judge just [must] ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*) In opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must produce sufficient evidence to reasonably support a jury verdict in its favor. (*Id.* at 249).

Police Officers' Violation of Decedent's Civil Rights

The Civil Rights Act, 42 U.S.C. § 1983, provides that:

> [e]very person who, under color of a statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected any citizen of the United States or another person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

> by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper procedure for redress. . . .

Rodriguez v. City of Passaic, 730 F. Supp. 1314, 1319 (D.N.J. 1990). In order to be a viable action, a claim brought under 42 U.S.C. § 1983 needs to identify a separate federally conferred right. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). Claims for "excessive force" will mostly be based on "the Fourth Amendment's prohibition against unreasonable seizures of the person or the Eighth Amendment's ban on cruel and unusual punishments." (*Id.*) In instances where the claim is based on an investigatory stop of a free citizen, the fourth amendment "objective reasonableness" standard is the appropriate measure to determine whether "excessive force" was used. (*Id.*, citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). Not only does a plaintiff need to prove that a federally conferred right has been interfered with but she must also show that the actor did it "under the color of state law." *Rodriguez*, 730 F. Supp. at 1319 (citing *West v. Atkins*, 487 U.S. 42 (1988)).

The Fourth Amendment

In *Graham v. Connor*, a police officer made an investigatory stop while the detainee was experiencing insulin shock. *Graham*, 490 U.S. at 388. The officer ordered the detainee to wait while he examined the circumstances that prompted the stop. (*Id.*) The investigation occurred despite the pleadings from the individual accompanying the detainee that the circumstances were created by "sugar shock." (*Id.*)

Other officers responded in the interim, handcuffed the detainee and pressed his face against the hood of the car, ultimately causing assorted injuries. (*Id.* at 389). The detainee was released once the story concerning "sugar shock" was corroborated. (*Id.*) The now former detainee filed a 42 U.S.C. § 1983 action against the officers. (*Id.*) The Supreme Court determined that this action was controlled by the federal rights provided under the fourth amendment. (*Id.* at 389). Therefore, the Supreme Court determined that an "objective reasonableness" analysis and not a substantive due process analysis was appropriate. (*Id.*)

Plaintiff's claim that the police officers infringed upon her civil rights concerns events surrounding the police officers' attempts to restrain the decedent in the course of a pre-arrest detention. (DiSomma Cert., Exh. D, Tr. 22:14-24). The police officers were present because the decedent crashed through a neighbor's window. (*Id.*) The purpose of the restraint was to remove the decedent from the apartment and enable the medical personnel to provide her with care. (*Id.*, Exh. F, Tr. 52:21-25). Plaintiff alleges that in the course of restraining the decedent, the police officers used "excessive force." (*Id.*, Exh. A, Compl, ¶¶ 5 and 6). To establish a civil rights violation for "excessive force," the plaintiff needs to establish that the force used to restrain the decedent was not reasonable under the circumstances. *Graham*, 490 U.S. at 398.

Reasonableness must be judged

> from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police

> officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

(*Id.* at 396-97; *see also Rodriguez v. City of Passaic*, 730 F. Supp. 1314, 1322 (D.N.J. 1990), *aff'd*, 914 F.2d 244 (3d Cir. 1990).

In the matter presently before the Court, the police officers ultimately restrained the decedent by handcuffing her wrists behind her back and securing her ankles with a bed sheet. (DiSomma Cert., Exh. F, Tr. 41:17-42:1). Before the police officers restrained the decedent, she had wandered around the apartment whose window she had crashed through. (*Id.*, Exh. D., Tr. 22:14-24). The decedent then proceeded to roll on the floor, thrashing her arms and legs and making unintelligible noises. (*Id.*, Exh. F, Tr. 35:9-17; Exh. G, Tr. 72:4; Exh. D, Tr. 28:7-20). The police officers assert they restrained the decedent in the manner described above to protect themselves, the occupant of the apartment, the medical personnel and the decedent. (*Id.*, Exh. F, Tr. 41:24-41:1; Exh. M, Tr. 120:8-17; Exh. L, Tr. 75:21-76:19).

Plaintiff contends that the presence of medical personnel should alter what is reasonable under the circumstances. (Plaintiff's Br. at 12). Plaintiff tries to categorize the events surrounding Ms. Perlmutter's detention as a medical emergency, making the police officers' alleged unilateral act unreasonable under the circumstances. (*Id.*) This Court disagrees.

Ms. Perlmutter entered into Julia Sinauskas' basement apartment by crashing through a sealed window. Ms. Sinauskas summoned the police officers. There is no evidence that the decedent was in distress when restrained and placed on the stretcher. Rather, there is proof that the moment the medical technicians observed Ms. Perlmutter to have ceased breathing, they immediately released all restraints and initiated treatment.

When a court attempts to determine the reasonableness of a police officer's action it must:

> stand in his shoes and judge the reasonableness of his actions based on the information he possessed and the judgment he exercised in responding to that situation. Knowledge of facts and circumstances gained by the officer after the completion of the act is irrelevant to a determination of the reasonableness of that officer's judgment vis-a-vis the conduct at issue.

Rodriguez, 730 F. Supp. at 1322 (citing *Sherrod v. Berry*, 856 F.2d 802, 804-805 (7th Cir. 1988). Taking into account all of the facts and circumstances surrounding the restraint of Ann Perlmutter, this Court determines that the amount of force the police officers used to restrain the decedent was reasonable under the circumstances. No rational jury could find otherwise. Therefore, the police officers did not violate Ms. Perlmutter's fourth amendment rights.

Substantive Due Process

Claims of excessive force originating from a detention of a free citizen are to be examined under the "objective reasonableness" standard of the fourth amendment.

Graham, 490 U.S. at 395. Substantive due process under the fourteenth amendment as described in *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973), and adopted by the Third Circuit in *Curtis v. Everrette*, 489 F.2d 516, 518 (3d Cir. 1974), is no longer applicable to these forms of 42 U.S.C. § 1983 actions. Therefore, claims under the fourteenth amendment are unavailable in this instance.

The Eighth Amendment: Cruel and Unusual Punishment.

The eighth amendment's prohibition against cruel and unusual punishment "is implicated only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Rodriguez*, 730 F. Supp. at 1319. The state must first obtain the power to punish, which is predicated by a party being judged guilty after being afforded due process [sic] law. (*Id.*, citing *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983)). Since Ms. Perlmutter had not been convicted of a crime, the eighth amendment is not implicated. (*Id.* at 1320).

Qualified Immunity

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is "clearly established" only where it is sufficiently clear that the objectively reasonable official, in hindsight would have understood that the alleged conduct violated

that right. *Rodriguez*, 730 F. Supp. at 1326-27 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Considering this Court's determination that the police officers acted reasonably when they restrained the decedent, their conduct did not violate a clearly established constitutional right.

Conspiracy to Deprive Plaintiff of a Right Secured by the Constitution

A conspiracy to interfere with an individual's civil rights exists if:

> two or more persons in any State or Territory conspire . . . for the purpose of depriving either directly or indirectly, any person . . . of equal protection of the laws . . . [and] one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of the conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured . . . may have an action for damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). To have a viable conspiracy action under 42 U.S.C. § 1985, the plaintiff must establish that the conspirators committed some act in furtherance of the conspiracy. *Griffin v. Breckenridge*, 403 U.S. 88, 103-104 (1971); *Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1172-73 (3d Cir. 1978). Plaintiff alleges that "[t]he use of unreasonable and unnecessary force against the decedent Ann Perlmutter constituted an overt act in furtherance of a conspiracy between the [police officers] to deprive the

decedent of her civil rights." (DiSomma Cert., Exh. A, Fifth Count, ¶ 2). This Court has determined that as a matter of law, the force used by the police officers was reasonable. Therefore, the plaintiff cannot establish that the conspirators committed some act in furtherance of the conspiracy.

In addition, for the reasons set forth at pages 7-8 of this Court's companion Opinion dismissing claims against the Mountainside Mobil ICU defendants, plaintiff has not made an adequate showing that any racial animus motivated the actions of any defendant herein.

John McNiff, individually and as Chief of police of the Bloomfield Police Department, the Police Department of the Township of Bloomfield, and the Township of Bloomfield are also defendants in the within action. Those defendants did not formally join the motion of the defendants Bloomfield police officers. However, this Court will also grant summary judgment in favor of those defendants.

Even when a party has not moved for summary judgment, the Court may, in appropriate circumstances, enter summary judgment in favor of such a party. *Thorn v. County of Monroe*, 586 F. Supp. 1085, 1087 n.5 (M.D. Pa. 1985); *Jackson v. Hammock*, 330 F. Supp. 1124, 1125 (E.D. Pa. 1971). After full arguments and considering the briefs on the issue, a district court can grant a nonmoving party summary judgment. *United States v. Cless*, 150 F. Supp. 687, 692 (M.D. Pa. 1957), *aff'd*, 254 F.2d 590 (3d Cir. 1958).

In the case at bar, any liability of the defendants McNiff, Bloomfield Police Department and the Township of Bloomfield can only be predicated upon *Monnell v. New*

York City Dept. of Social Services, 436 U.S. 658 (1978). The issues involving *Monnell* liability have been fully briefed, argued and adjudicated in connection with the prior motions of defendants Bloomfield Volunteer Emergency Squad and Mountainside Hospital for summary judgment. There being no underlying viable claim under § 1983 or § 1985 against the individual defendants allegedly supervised and/or trained by such defendants as McNiff, Bloomfield Police Department and Bloomfield, no *Monnell* claim may be maintained against the latter. *See* Opinion of Nov. 18, 1993 at 7-8; Opinion of June 1, 1994 re: Mountainside defendants at 9. *Monnell* liability having been fully and fairly litigated regarding other motions, and its applicability to the present motions being obvious, summary judgment may and will be granted in favor of the defendants McNiff, Bloomfield Police Department and the Township of Bloomfield.

State Law Claims

The dismissal of the federal claims against the police officers raises the question as to whether the state law claims should remain before this Court. Congress has recently enacted a supplemental jurisdiction statute stating that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the [ ] Constitution.

28 U.S.C. § 1367(a) (1990).

Section 1367 gives the district court discretion to decline to grant supplemental jurisdiction. 28 U.S.C. § 1367(c) (1990). The statute provides that:

> the district courts may decline to exercise supplemental jurisdiction over a claim under (a) if:
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction,
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (1990).

All claims over which this Court would have original jurisdiction have now been dismissed due to summary judgments in favor of the respective defendants. Claims under state law focus upon medical malpractice as to some defendants and upon the New Jersey Tort Claims Act as to others, such as the Bloomfield defendants to whom the present Opinion is addressed. These claims are best addressed in the Superior Court of the State of New Jersey. Accordingly, they will be dismissed without prejudice.

CONCLUSION

For the reasons set forth above, summary judgment is hereby granted in favor of all defendants named in the Fourth through Seventh Counts, inclusive, and the Eleventh Count; and those Counts are dismissed, with prejudice. Also, claims based upon state law, as set forth in the First, Second, Third and Tenth Counts are dismissed, without prejudice, pursuant to 28 U.S.C. § 1367(c). With the entry of this Opinion and Order, no further claims of the plaintiff remain in this action.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: June 7, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as-Attendant of the Bloomfield Volunteer Emergency

Civil Action
No. 91-2140

ORDER

(Filed
June 7, 1994)

Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 7th day of June, 1994,

ORDERED that summary judgment is hereby granted in favor of all defendants named in the Fourth through Seventh and the Eleventh Counts of plaintiff's Complaint, and those Counts are hereby dismissed, with prejudice; and it is further

ORDERED that the First, Second, Third and Tenth Counts of plaintiff's Complaint are hereby dismissed, without prejudice.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,	:	Civil Action No. 91-2140
Plaintiff,	:	**OPINION**
v.	:	
MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK,	:	

Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

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BISSELL, *District Judge*

This action, filed on May 16, 1991, involves federal civil rights claims accompanied by state law negligence claims. The death of Ann Perlmutter, the administratrix's daughter ("plaintiff"), while under the supervision of the Bloomfield Police, the Bloomfield Volunteer Emergency Squad ("BVES"), and the Mountainside Hospital Mobile Intensive Care Unit ("Mountainside Unit") prompted the bringing of this suit.

On November 18, 1993, this Court granted summary judgment to defendants BVES and its two members, Frederick Menzel and Andrew Depczek. These three parties were named in the Fifth, Eighth and Tenth Counts of

plaintiff's Complaint. The Fifth Count charged a conspiracy with other defendants to violate 42 U.S.C. § 1985. The Eighth Count charges BVES and its members with negligence. The Tenth Count alleges a breach of the plaintiff's constitutional rights pursuant to *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

Mountainside Hospital Mobile Intensive Care Unit, Attendant Davis and Dan MacMahon ("Mountainside defendants") have brought a motion for summary judgment. The Mountainside defendants are named in the Fifth, Ninth and Eleventh Counts of plaintiff's Complaint. As stated above, the Fifth Count charges a conspiracy to violate 42 U.S.C. § 1985. The Ninth Count alleges that the Mountainside defendants committed medical malpractice. A breach of the plaintiff's constitutional rights pursuant to *Monnell* is alleged in the Eleventh Count. *See Monnell*, 436 U.S. 658 (1978).

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

FACTS

Ann Perlmutter died on May 26, 1989 as a result of an incident that occurred on May 20, 1989. (Noto Cert., ¶ 2). The act that brought all of the defendants into contact with the plaintiff was Ann Perlmutter crashing through the window of Julia Sinauskas' basement apartment at 165 Franklin Street, Bloomfield, New Jersey. (Defendants' Br. at 1). 165 Franklin Street was also Ann Perlmutter's residence. (Noto Cert., ¶ 1).

In response to the incident, the Bloomfield Police, the BVES and the Mountainside Unit were dispatched to 165 Franklin Street. (Defendants' Br. at 1 and Exh. B at 65, ls. 3-7). As members of the BVES, Menzel and Depczek arrived on the scene and were directed to a basement apartment of the building. (Noto Cert., ¶ 4). They were told a woman had allegedly crashed through the resident's window. (*Id.*) When Menzel and Depczek initiated treatment of Ms. Perlmutter, she immediately thrashed her arms and legs. (*Id.*, ¶ 5). The police officers then handcuffed Ms. Perlmutter's arms behind her back and tied her legs together with a bed sheet. (*Id.*) The police placed Ms. Perlmutter "face down" on a stretcher. (*Id.*, ¶ 7).[1] Menzel and Depczek strapped her to the stretcher. (*Id.*)

The Mountainside defendants, in their capacity as Mountainside Hospital Intensive Care Unit paramedics, were the last to arrive. (Defendants' Br. at 2). While the plaintiff was being restrained and moved out of the apartment, the Mountainside defendants were putting medical equipment into the BVES ambulance. (*Id.*)

After carrying her out of the apartment, the BVES volunteers strapped Ms. Perlmutter to a rolling cot, "face down" again. (Noto Cert., ¶¶ 9-11). As they wheeled the plaintiff to the ambulance, Menzel and Depczek noticed that Ms. Perlmutter had become "totally quiet." (*Id.*, ¶ 12). Upon closer examination, the BVES volunteers observed that she was not breathing. (*Id.*) They immediately

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[1] "Face down" was defined as on her stomach with her head to the side. (Menzel Dep. at 50, ls. 2-7).

removed the handcuffs and restraining straps. (*Id.*, ¶ 13). The Mountainside paramedics and the BVES members then turned Ms. Perlmutter over and began medical treatment to try to revive her. (*Id.*)[2] While traveling to the hospital, the medical treatment in the ambulance revived Ms. Perlmutter's heartbeat but not her breathing. (*Id.*, ¶ 14). Ann Perlmutter never regained consciousness. (*Id.*, ¶ 15). She died on May 26, 1989. (*Id.*) A toxicology report showed the residue of cocaine in her blood. (Defendants' Br. at 3).

ANALYSIS

I. Standard of Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987).

In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the

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[2] The exact medical treatment upon noticing her "totally still" is as follows:

> One of us checked for a pulse. Found no pulse. One of us were probably at the same time undoing the straps and I took her handcuffs off. We started CPR, bag valve mask and started chest compressions. The medics hooked her up to telemetry. I believe she was also intubated.

(Menzel Dep. at 58, ls. 12-19).

nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that in applying the criteria for granting summary judgment,

> the judge just ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*) In opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must produce sufficient evidence to reasonably support a jury verdict in its favor. (*Id.* at 249).

II. The Section 1985 Conspiracy

This Court addressed the viability of plaintiff's charge of a conspiracy to interfere with Ms. Perlmutter's civil rights in the opinion granting BVES' motion for summary judgment. (Op. of Nov. 18, 1993 at 6). The conspiracy charge was dismissed as it applied to BVES, Menzel and Depczek because the claim lacked an allegation of "some racial or otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (*Id.* (citing *Bray v. Alexander Clinic*, ___ U.S. ___, 113 S. Ct. 753, 755 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

In the BVES opinion, this Court held that no applicable "discriminatory animus" was alleged in the Complaint. (Op. of Nov. 18, 1993 at 7). The Court specifically determined that 42 U.S.C. § 1983 liability was only alleged against the defendant police officers in this Complaint. (*Id.* at 6). Regardless, the Mountainside defendants are not "state actors" within the purview of § 1983. (*Id.* at 9) (citing *Community Med. Center v. Emergency Med. Services*, 712 F.2d 878, 880 (3d Cir. 1983)).

"When a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages of the litigation." *In re Resyn Corporation*, 945 F.2d 1279, 1281 (3d Cir. 1991). Plaintiff relies on assertions made by the Mountainside defendants that they coordinate medical services with BVES and the Bloomfield police as evidence of the existence of a conspiracy. (Perlmutter's March 2, 1994 letter and attached depositions). The existence of these communications do not establish the discriminatory intent necessary to establish a § 1985

conspiracy. *Bray*, ___ U.S. ___, 113 S. Ct. at 755. Therefore, summary judgment for the Mountainside defendants is appropriate on the Fifth Count. (Op. of Nov. 18, 1993 at 7).[3]

III. The Monnell Claim

This Court has also addressed the viability of a *Monnell* claim against a private, not-for-profit ambulance service in conjunction with this action. (Op. of Nov. 18, 1993 at 7-8). The essence of a *Monnell* claim is the failure of a public entity to supervise and instruct its agents. (*See* Complaint at Tenth and Eleventh Counts). This Court has held that without a § 1985 or § 1983 claim against the individual defendants, no *Monnell* claim can be brought against an organization. (Op. of Nov. 18, 1993 at 8). No § 1985 of [sic] § 1983 claim exists against defendants Attendant Davis and Dan MacMahon; therefore, no *Monnell* claim can be sustained against Mountainside Hospital.

Alternatively, this Court has addressed the unavailability of a 42 U.S.C. § 1983 claim against a private, not-for-profit ambulance service. (*Id.* at 8-10). The

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[3] Plaintiff adds that the designation of Ann Perlmutter as white on incident reports when she is in fact black creates at least a permissible inference of a racial animus or racially motivated cover-up which will allow her claim to survive summary judgment. This tenuous speculation, however, does not raise a *genuine* issue of material fact. Such an entry is consistent with either a mistake or a genuine belief that plaintiff was white. The record evidence points to the latter.

Mountainside Hospital Intensive Care Unit is also a private, not-for-profit ambulance service. (Defendants' Br. at 15). The law of the case dictates that this reasoning, which prevented § 1983 liability from attaching to BVES, prohibits § 1983 liability from attaching to the Mountainside defendants under the Eleventh Count. *In re Resyn Corporation*, 945 F.2d at 1281.

IV. Medical Malpractice

The Ninth Count charges the Mountainside defendants with not employing the care and skill ordinarily used by mobile intensive care unit attendants. The Court could entertain this claim herein on the basis of supplemental jurisdiction. 28 U.S.C. § 1367. However, in a companion opinion all other claims against all defendants are being dismissed. Accordingly, the Court will also dismiss this claim, but without prejudice.

V. Motion to Reconsider the BVES Opinion

Motions for reconsideration are governed by General Rule 12I, which states as follows:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. No oral argument shall be heard unless the Court grants the motion and specifically directs that the matter shall be reargued orally.

In most instances, a motion for reargument under General Rule 12I is considered a motion for reconsideration under Fed. R. Civ. P. 59(e). *See e.g. Federal Kemper Ins. Co. v. Rauscher,* 807 F.2d 345, 348 (3d Cir. 1986). Furthermore, there is considerable overlap between Fed. R. Civ. P. 59(e) and 60(b) such that a motion designated as one may be decided under the other. *See e.g. Conway v. Johnson,* 115 F.R.D. 603 (N.D. Cal. 1987) (citing *Moore's Federal Practice* ¶ 60.22[2] at 60-138 to 60-139, and 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2817 at 110).

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985). Where the evidence is not newly discovered, it may not be presented in support of a motion for reconsideration. (*Id; see also Keene Corp. v. International Fidelity Ins. Co.,* 561 F. Supp. 656, 665 (N.D. Ill. 1982) ("Such motions cannot . . . be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion.")

Furthermore, it is well settled that a motion for reargument under General Rule 12I must do more than just express disagreement or dissatisfaction with the court's previous decision. Such concerns "should be dealt with in the normal appellate process, not on a motion for reargument under Local Rule 12(I)." *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.,* 680 F. Supp. 159, 163 (D.N.J. 1988); *see also Carteret Savings Bank, F.A. v. Shushan,* 721 F. Supp. 705, 706 (D.N.J. 1989) (stating that a motion under General Rule 12I must present more than "a recapitulation of the cases and arguments considered by this Court before

rendering its original decision.") (*See generally* Lite, *New Jersey Federal Practice Rules,* Comment to Rule 12I).

Contained in the opposition to the Mountainside defendants' motion to dismiss is a request by Ms. Perlmutter that this Court reconsider its previous decision concerning BVES and its members. (Plaintiff's Br. at 5; Perlmutter Letter of March 2, 1994 at 4). This brief request does not come close to complying with the necessary requirements of a motion or cross-motion for relief from a judgment. Fed. R. Civ. P. 59 and 60. Nor does it comply with the strictly construed procedural requirements of the General Rules of the District of New Jersey. *See* General Rule 12I.

Moreover, plaintiff's request to reconsider this Court's dismissal of the claims against BVES and its members only expresses disagreement and dissatisfaction with an earlier decision of this Court. (Plaintiff's Br. at 5; Perlmutter Letter of March 2, 1994 at 4). Excluding for a moment the fact that no information has been presented to this Court which would lead it to believe that its BVES decision is incorrect, the motion is time barred as well as procedurally and substantively flawed.

CONCLUSION

In light of the foregoing, Mountainside Hospital, Attendant Davis and Dan MacMahon's motion for summary judgment is granted. Accordingly, as to those defendants, the Fifth and Eleventh Counts in plaintiff's Complaint are dismissed with prejudice. The Ninth Count in the Complaint is dismissed without prejudice.

Plaintiff's request to reconsider this Court's BVES opinion is denied.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: June 7, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL,

Civil Action
No. 91-2140

ORDER

(Filed
Jun. 7, 1994)

Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 7th day of June, 1994,

ORDERED that the motion of defendants Mountainside Hospital Mobile Intensive Care Unit, Attendant Davis and Dan MacMahon for summary judgment be and it hereby is granted and, as to those defendants, the Fifth and Eleventh Counts of plaintiff's complaint are hereby

dismissed with prejudice and the Ninth Counts [sic] is hereby dismissed without prejudice.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, et al., Plaintiff, v. MICHAEL COOPER, et al., Defendants.	:	Hon. John W. Bissell Civil Action No. 91-2140 **OPINION** (Filed Aug. 23, 1994)

BISSELL, District Judge

Plaintiff and defendants submit cross-motions for reconsideration of the June 7, 1994 decisions to dismiss the present action on summary judgment. They have filed their motions pursuant to New Jersey Local Rule 12I.

Plaintiff specifically requests that the Court reconsider whether the Mountainside Hospital Mobile Intensive Care Unit and attendants named as individuals ("Mountainside defendants"), Township of Bloomfield, The Police Department of the Township of Bloomfield ("the municipal defendants"), and several police officers in both their official and individual capacities ("police officers") violated the plaintiff's civil rights based on 42 U.S.C. § 1983, and conspired to deprive plaintiff of her civil rights based on 42 U.S.C. § 1985. In addition, plaintiff asks that the Court reconsider the accompanying state claims as they pertain to the Mountainside defendants, the municipal defendants, as well as the defendant police

officers. Her motion is based on the alleged failure of the Court to properly apply the "objective reasonableness" standard as well as the alleged oversight of the Court to consider expert testimony and inconsistencies in the evidence which plaintiff claims should preclude summary judgment.

Defendants Bloomfield Volunteer Emergency Squad and the attendants named as individuals ("BVES defendants"), the Mountainside defendants, the municipal defendants, and the police officers specifically request that the Court reconsider its decision to dismiss the pendant state law claims without prejudice.

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

PROCEDURAL HISTORY

On May 16, 1991, plaintiff, Dr. Barbara Lee Perlmutter, administratrix of decedent Ann Perlmutter, filed a federal civil rights claim and accompanying state law negligence claims against the BVES defendants, Mountainside defendants, municipal defendants, and police officers. (Op. of June 7, 1994, p.3).

On November 18, 1993, this Court granted summary judgment to the BVES defendants. (*Id.*). The plaintiff alleged that defendants conspired to violate plaintiff's civil rights pursuant to 42 U.S.C. 1985. In addition, the plaintiff claimed that defendants breached decedent's constitutional rights pursuant to *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Plaintiff also

asserted several state tort claims against these defendants. (*Id.*) The Court dismissed the federal claims with prejudice; the state claims were dismissed without prejudice to their being reinstituted in a state court.

This Court heard oral arguments on April 11, 1994, pertaining to the Mountainside defendants' motion for summary judgment. The Court reserved decision on that motion.

On May 23, 1994, the Court heard oral arguments from the municipal defendants and police officers. The Court verbally granted these defendants' motion for summary judgment. The Court also stated that a written opinion would follow.

Before the issuance of the written opinion, on June 2, 1994, plaintiff filed a "Motion for Reconsideration and/or Clarification" requesting that the Court dismiss the state negligence claims without prejudice for lack of pendant jurisdiction. (Plaintiff's Brief on June 2, 1994, p.1).

On June 7, 1994, this Court issued two written decisions, the first pertaining to Mountainside defendants, the second to the municipal defendants and police officers.

In the first opinion concerning the Mountainside defendants, this Court granted summary judgment. (Mountainside Op. of June 7, 1994, p.3). The plaintiff alleged the Mountainside defendants conspired to violate plaintiff's civil rights, violating 42 U.S.C. § 1985, and that defendants breached her constitutional rights set forth in *Monnell. See Monnell,* 436 U.S. 658 (1978). (*Id.*). The plaintiff also brought a medical malpractice claim. (*Id.* at 4). As

with the BVES defendants, the federal claims were dismissed with prejudice, the state negligence claims without.

Also on June 7, 1994, this Court dismissed plaintiff's claims against the remaining municipal defendants and police officers. (Police Op. of June 7, 1994, p.17). The plaintiff claimed that the defendants violated the plaintiff's civil rights pursuant to 42 U.S.C. § 1983, and that they conspired to deprive the plaintiff of her civil rights, violating 42 U.S.C. § 1985. (*Id.* at 4). In addition, plaintiff charged defendants with wrongful death claims pursuant to N.J.S.A. 2:15-3, and sued for depriving Dr. Barbara Perlmutter of the support and companionship of her daughter. (*Id.*). As with the other defendants, the federal claims were dismissed with prejudice, the state claims were dismissed without.

On June 9, 1994, plaintiff withdrew the June 2, 1994 motion for reconsideration because her "Motion for Reconsideration and/or Clarification" was "answered" when the June 7, 1994 Opinion was filed. (Plaintiff's Letter to the Court dated June 9, 1994, p.1). Plaintiff has not been prejudiced by this, however, because the Court has entertained her renewed motion.

On June 17, 1994, plaintiff filed a substitution of attorney. Also on June 17, 1994, both plaintiff and defendant police officers filed a motion for reconsideration of the June 7th Opinion. (Plaintiff's letter to the Court dated June 17, 1994, p.1). At this time, the Court granted plaintiff's and defendants' request for supplemental briefing.

On July 15, 27 and 28, 1994, the municipal defendants, BVES defendants and Mountainside defendants, respectively, filed a motion for reconsideration.

ANALYSIS

1. Standards Governing Motions for Reargument

Motions for reargument are governed in this District by General Rule 12I of the United States District Court for the District of New Jersey.[1] General Rule 12I specifies that a motion for reargument must be filed within ten (10) days after an order or judgment has been entered. Lite, *New Jersey Federal Practice Rules*, Comment 8 to Rule 12I at 71. The Court can permit relaxation of this restriction "only in extraordinary circumstances." (*Id* at 72).

A motion for reconsideration must address dispositive factual matters or controlling issues of law which were presented but not considered by the court in the previous ruling. *Public Int. Research Group v. Yates Industries*, 790 F. Supp. 511, 512 (3d Cir. 1991). Thus, matters not raised in the previous ruling may not be introduced on a motion for reargument. In addition, parties may not expand the record on reargument to include matters not originally addressed; all such arguments will be excluded from the court's evaluation of the 12I motion except under unusual circumstances. *See Florham Park Chevron,*

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[1] In most instances, a motion for reargument under General Rule 12I is considered a motion for reconsideration under Fed. R. Civ. P. 59(e). *See e.g., Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986). Thus, courts frequently use "reargument" and "reconsideration" interchangeably.

Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988) (parties may not expand a record on reargument); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (acquisition of dispositive evidence unavailable in the previous trial was a valid reason for granting motion for reargument).[2] It is essential that the party seeking reargument show more than simple disagreement with a court's prior ruling. *Florham Park Chevron*, 680 F. Supp. at 163.

2. The Plaintiff's Instant Action

In addition to the motion for reargument, the plaintiff moves to amend the June 7, 1994 orders pursuant to Rule 59(e), and for relief from the Orders pursuant to Rule 60(b). In most instances, a motion for reconsideration under General Rule 12I is considered a motion for reargument under Fed. R. Civ. P. 59(e). Further, there is considerable overlap between Fed. R. Civ. P. 59(e) and 60(b) such that a motion designated as one may be decided under the other. *See Conway v. Johnson*, 115 F.R.D. 603 (N.D. Cal. 1987) (*citing* Moore's Federal Practice P 60.22[2], at 60-138 to 60-139, and 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2817, at 110). For these

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[2] In this case, plaintiff has tendered several new, belated expert reports. *See e.g.*, letter from plaintiff's new counsel and reply declaration of David N. Butler dated August 8, 1994. While the Court has considered all briefs submitted on the present motions, it may not and has not considered those untimely expert reports. The Court has also considered plaintiff's supplemental affidavit dated June 16, 1994, and its exhibits. Nothing contained therein raises genuine issues of material fact precluding the summary judgment previously granted.

reasons, this Court will consider those rules as well as the requirements of Local Rule 12I.

The Court has carefully reviewed all papers submitted and determines that no viable basis has been submitted by any party for reconsideration of the opinions and orders previously entered in this matter. No facts, controlling decisions or other matters before the Court when it was considering its prior decisions were overlooked or misapplied. No reason enumerated in Fed. R. Civ. P. 60(b), including the residual category found in subsection 60(b)(6), is presented with sufficient persuasiveness to warrant relief from those orders in any respect. One must keep in mind that this Court focused upon and adjudicated the alleged federal claims only. Not every arguable state-law tort is a civil rights violation. No material legal issues were overlooked or wrongly decided in the prior opinions.

Finally, as to the motions of the defendants for reconsideration, this Court remains convinced that its determination not to exercise supplemental jurisdiction over state law claims is correct. (*See* 28 U.S.C. 1367 (c) and the discussion in the June 7, 1994 opinion pertaining to the municipal and police officer defendants at 16-17). Whether any of the Court's rulings in the case at bar will support either claim or issue preclusion arguments in a subsequent state proceeding is a matter to be addressed in that court.

An order denying all motions for reconsideration of the Court's prior opinions and orders is enclosed.

/s/ John W. Bissell
JOHN W. BISSELL, U.S.D.J.

DATED: August 23, 1994

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, et al., Plaintiff, v. MICHAEL COOPER, et al., Defendants.	Hon. John W. Bissell Civil Action No. 91-2140 **ORDER** (Filed Aug. 23, 1994)

This matter having been brought before the Court upon the application of plaintiff Dr. Barbara Lee Perlmutter and defendants for reconsideration of this Court's prior opinions and orders dismissing the within action; and the Court having considered the papers submitted hereon; and for reasons set forth in this Court's opinion of even date;

IT IS ON THIS 23d day of August, 1994;

ORDERED that plaintiff Dr. Barbara Lee Perlmutter's and defendants' motions for reconsideration be and the same are hereby denied in their entirety.

/s/ John W. Bissell
JOHN W. BISSELL U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5579

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and DR. BARBARA LEE PERLMUTTER, Individually,

Appellant

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MCNIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; BLOOMFIELD VOLUNTEER EMERGENCY SQUAD; AMBULANCE ATTENDANT DAVIS, Individually and as attendant of the Mountainside Hospital Mobil Intensive Care Unit (MICU aka Med VII): DAN MACMAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka MED

VII); JOHN DOE III, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); MOUNTAINSIDE HOSPITAL
(Caption amended per the Clerk's 10-21-94 order)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE, SAROKIN and ALDISERT*, *Circuit Judges*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: July 12, 1995

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* As to panel rehearing.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO: 91-2140 (JWB)

HONORABLE

Plaintiffs, DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually v. Defendants, MICHAEL COOPER, Individually and as a Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; PTL. ZELINSKY, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE,	COMPLAINT AND DEMAND FOR TRIAL BY JURY (Filed May 16, 1991)

Individually and as a Police :
Officer of the Bloomfield Police :
Department; SGT. BEHRE, :
Individually and as a Police :
Officer of the Bloomfield Police :
Department; JOHN MC NIFF, :
Individually and as Chief of Police :
of the Bloomfield Police :
Department; THE POLICE :
DEPARTMENT OF THE :
TOWNSHIP OF BLOOMFIELD; :
THE TOWNSHIP OF :
BLOOMFIELD; F. MENZEL, :
Individually and as Captain of the :
Bloomfield Volunteer Emergency :
Squad; A. DEPCZEK, Individually :
and as and as [sic] attendant of the :
Bloomfield Volunteer Emergency :
Squad; JOHN DOE II, Individually :
and as attendant of the Bloomfield :
Volunteer Emergency Squad; :
Ambulance Attendant DAVIS, :
Individually and as attendant of :
the Mountainside Hospital Mobile :
Intensive Care Unit (MICU aka :
Med VII); DAN MAC MAHON, :
Individually and as attendant of :
the Moutainside Hospital Mobile :
Intensive Care Unit (MICU aka :
Med VII); JOHN DOE III, :
Individually and as attendant of :
the Mountainside Hospital Mobile :
Intensive Care Unit (MICU aka :
Med VII); and MOUNTAINSIDE :
HOSPITAL :
.....:

Plaintiff Dr. Barbara Lee Perlmutter, residing at 52 Salter Place, in the Township of Maplewood, County of Essex, and State of New Jersey, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, deceased, and Dr. Barbara Lee Perlmutter, Individually, complaining of the above named defendants says:

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1985 [sic], 1988 and the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §§ 1331, 1343 and 1346(b) to recover damages for violations of plaintiff's civil rights. The amount in controversy exceeds $10,000.00 excluding interest and costs.

Plaintiff further invokes the pendent jurisdiction of the Court to consider claims arising under state law.

PARTIES

2. Plaintiff Dr. Barbara Perlmutter is and was at all times described in this Complaint a citizen of the United States and a resident of the Township of Maplewood, County of Essex and State of New Jersey.

3. Plaintiff Dr. Barbara Lee Perlmutter is the mother of decedent Ann Perlmutter and is the General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter.

4. Defendant Police Officer Michael Cooper is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

5. Defendant Police Officer Priolo is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

6. Defendant Police Officer Zelinsky is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

7. Defendant Police Officer Robert Hochstuhl is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

8. Defendant Sgt. Behre is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant township of Bloomfield. He is sued individually and in his official capacity.

9. Defendant John Doe, whose identity is as yet unknown to plaintiff, is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

10. Defendant John McNiff is and was at all relevant times Chief of Police of the Bloomfield Police Department acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. As such he was the Commanding Officer of defendant Police Officers Michael Cooper, Priolo, Zelinsky, Hochstuhl, John Doe and Sgt. Behre and was responsible for the training and conduct of said defendants. He is also responsible by law for enforcing the regulations of the Bloomfield Police Department and for ensuring that Bloomfield Police Officers obey the laws of the State of New Jersey and the United States. He is sued individually and in his official capacity.

11. At all times relevant hereto and in all their actions described herein, the defendants Cooper, Priolo, Zelinsky, Hochstuhl, Doe, Behre and McNiff were acting under color of law and under color of their authority as Police Officers and Police Chief of the Township of Bloomfield.

12. The defendant Township of Bloomfield is a municipal corporation within the State of New Jersey and at all times relevant hereto employed the defendants Cooper, Priolo, Zelinsky, Hochstuhl, Doe and Behre as police officers and defendant McNiff as police chief.

13. Defendants Police Department of the Township of Bloomfield is a governmental entity of the County of Essex, State of New Jersey and at all times relevant hereto it employed the aforementioned defendants.

14. F. Menzel is and was at all times relevant hereto a captain of the Bloomfield Volunteer Emergency Squad acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

15. A. Depczek is and was an attendant of the Bloomfield Volunteer Emergency Squad and was acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

16. Defendant John Doe II whose identity is as yet unknown to plaintiff is and was an attendant of the Bloomfield Volunteer Emergency Squad and was acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

17. Defendant Ambulance Attendant Davis is and was an attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII) and was acting in such capacity as the agent, servant, and employee of the Mountainside Hospital. He is sued individually and in his official capacity.

18. Defendant Ambulance Attendant Dan MacMahon is and was an attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII) and was acting in such capacity as the agent, servant and

employee of the Mountainside Hospital. He is sued individually and in his official capacity.

19. Defendant Ambulance Attendant John Doe III whose identity is as yet unknown to plaintiff is and was an attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII) and was acting in such capacity as the agent, servant and employee of the Mountainside Hospital. He is sued individually and in his official capacity.

20. Defendant Mountainside Hospital is a private, non profit hospital located at Bay and Highland Avenues in Montclair, New Jersey and as such is responsible for the actions of the Mountainside Hospital Mobile Intensive Care Unit and its agents, servants and employees.

FIRST COUNT

1. On or about May 20, 1989, defendants Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, all members of defendant Bloomfield Police Department, responded to the address of decedent located at 165 Franklin Avenue in Bloomfield, New Jersey.

2. Upon their arrival, the defendant police officers found the decedent on the floor of a fellow tenant's basement apartment, and in obvious need of medical attention.

3. The decedent had various lacerations on and about her hands and body. She was bleeding profusely as a result of her various injuries.

4. The defendant police officers responded to the decedent's obvious need of immediate medical attention

by cuffing the decedent's hands behind her back and tying her legs together with a bedsheet.

5. When the decedent was completely immobilized, the defendant police officers threw the decedent upon a stretcher, with her face down and her hands and feet bound behind her. The defendants then tied the decedent to the stretcher face down and had her transported to Clara Maass Medical Center where she died on May 26, 1989.

6. The decedent's respiration was severely restricted as a result of her being held face down with her face buried into the stretcher and her hands and feet bound behind her.

7. The defendant police officers' use of unreasonable and unnecessary force in restraining the decedent was a direct and proximate cause of her death.

7.1 The defendant police officers' actions, conducted either knowingly, intentionally, maliciously, or with reckless disregard or negligently, deprived the decedent, Ann Perlmutter, of her civil rights.

7.2 Defendant police officers' actions were committed under the color of authority as Bloomfield Police Officers, and were entirely unjustified by the actions of the decedent, Ann Perlmutter.

7.3 The decedent, Ann Perlmutter, has been denied the right to be free from physical violence and abuse, and to be free from the use of excessive and unreasonable force against her person.

8. The defendant police officers were negligent in failing to adequately and properly exercise appropriate

arrest and restraint procedures and failing to conform to appropriate standards and procedures regarding detainment.

9. As a direct and proximate result of the negligent conduct of the defendant police officers, the decedent was caused to suffer severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

10. Plaintiff Dr. Barbara Lee Perlmutter was appointed Administratrix ad Prosequendum of the estate of Ann Perlmutter, deceased, by the Surrogate of the County of Essex, State of New Jersey.

11. The estate of the decedent was liable for hospital, medical, funeral and burial expenses and charges for the decedent.

12. The decedent, Ann Perlmutter, left surviving her mother, Plaintiff Dr. Barbara Lee Perlmutter. At the time of her demise and by reason of the wrongful death of the decedent, Plaintiff Dr. Barbara Lee Perlmutter has suffered loss of the companionship and emotional support of the decedent.

13. There is, and at the time of the negligence hereinafter set forth, there was, in force and effect in the State of New Jersey, a Death Statute known and designated as N.J.S.A. 2A:31-1 through 6. Plaintiff brings this action pursuant to provisions thereof for the benefit of the next of kin of decedent.

14. A Notice of Intent to File a Claim was filed on behalf of the plaintiff on August 20, 1989.

14.1 More than six (6) months have passed since the filing of the Notice of Intent to File a Claim, and plaintiffs' claims remain unsatisfied.

14.2 This action is commenced within two (2) years after the happenings of the death of the decedent.

WHEREFORE, Plaintiffs, Dr. Barbara Lee Perlmutter, General Administratrix and Administratix ad Prosequendum of the Estate of Ann Perlmutter, and Dr. Barbara Lee Perlmutter, individually demand judgment against the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, individually and as Police Officers of the defendant Bloomfield Police Department, jointly and severally, for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

SECOND COUNT

1. Plaintiffs repeat each and every allegation contained in the First Count of the Complaint as though fully set forth at length herein.

2. As a result of the negligence of the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, individually and in the course of their employment with defendant Bloomfield Police Department, plaintiffs' decedent suffered great pain and suffering.

3. There is, and at the time of the negligence hereinafter set forth, there was in force and effect in the State

of New Jersey a Survival Action Statute known and designated as N.J.S.A. 2:15-3 and plaintiffs bring this action pursuant to provisions thereof.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and Dr. Barbara Lee Perlmutter, individually demand judgment against the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre individually and as Police Officers of defendant Bloomfield Police Department, jointly and severally, for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

THIRD COUNT

1. Plaintiffs repeat each and every allegation contained in the First and Second Counts of the Complaint as set forth at length herein and makes them a part thereof.

2. Plaintiff Dr. Barbara Lee Perlmutter is the mother of decedent Ann Perlmutter. As a result of the negligence of the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre individually and as Police Officers of defendant Bloomfield Police Department, plaintiff has been deprived of the pecuniary support and companionship of her daughter, Ann Perlmutter.

WHEREFORE, Plaintiff Dr. Barbara Lee Perlmutter demands judgment against the defendants, jointly and severally for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

FOURTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First, Second and Third Counts of this Complaint as if set forth at length herein and makes them a part thereof.

2. The actions taken by the defendant police officers were in direct violation of 42 U.S.C. § 1983, depriving the decedent Ann Perlmutter of the following rights, privileges and immunities secured to her by the constitution of the United States:

a) The right to be free from cruel and unusual punishment, secured by the Eighth and Fourteenth Amendments to the Constitution of the United States.

b) The right not to be deprived of life, liberty, or property without due process of law secured under the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The acts, conduct and behavior of the defendant police officers were performed either knowingly, intentionally or maliciously by reason of which the plaintiffs are entitled to an award of punitive damages.

4. At all times herein mentioned, the defendants were acting under color of state law.

5. As a direct and proximate result of the defendant police officers actions, the decedent Ann Perlmutter suffered severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and Dr. Barbara Lee Perlmutter individually, demand judgment against the defendants jointly and severally for compensatory and punitive damages, together with interest, costs of suit and attorney's fees, pursuant to the provisions of 42 U.S.C. § 1988.

FIFTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Fourth Counts in this Complaint as set forth at length herein and makes them a part thereof.

2. The use of unreasonable and unnecessary force against the decedent Ann Perlmutter constituted an overt act in furtherance of a conspiracy between the defendants to deprive the decedent of her civil rights.

3. The said conspiracy and the acts in furtherance thereof were in direct violation of 42 U.S.C. § 1985, depriving the decedent Ann Perlmutter of her rights privileges and immunities secured to her by the Constitution of the United States under the provisions of the Fifth, Eighth and Fourteenth Amendments.

4. The acts, conduct and behavior of the defendants were performed by them knowingly, intentionally and maliciously, by reason of which the plaintiffs are entitled to an award of punitive damages.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter individually, demand judgment against the defendants, jointly and severally, for compensatory and punitive damages, together with interest, costs of suit, and attorney's fees, pursuant to the provisions of 42 U.S.C. § 1988.

SIXTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Fifth Counts of this Complaint as if set forth at length herein and makes them a part thereof.

1. Plaintiffs repeat each and every allegation contained in the First through Fifth Counts of this Complaint as if set 1 forth at length herein and makes them a part thereof. [sic – duplication of paragraph in original]

2. Defendant John McNiff, as the Chief of Police of the Bloomfield Police Department, was in a position of authority to prevent or attempt to prevent the previously mentioned negligent, unlawful, and conspiratory conduct of the defendant police officers, who were all subordinate police officers under his direction.

3. Defendant McNiff failed to properly train and supervise his subordinate defendant police officers as to the proper procedures and proper use of force in effecting an arrest.

4. The failure of the defendant John McNiff to prevent or attempt to prevent the negligent, unlawful and

conspiratory conduct of his subordinate defendant police officers named herein, when he knew or reasonably should have known of said negligent, unlawful and conspiratory conduct, was in direct violation of 42 U.S.C. § 1985 and 42 U.S.C. § 1983 and deprived the decedent Ann Perlmutter of her aforesaid civil rights, privileges, and immunities secured to her under the Constitution of the United States under the provisions of the Fourth, Fifth, Eighth and Fourteenth Amendments.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter, individually, demand judgment against the defendants, jointly and severally for compensatory and punitive damages, together with interest costs of suit, and attorney's fees, pursuant to the provisions of 42 U.S.C. § 1988.

SEVENTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Sixth Counts of this Complaint as though set forth at length herein.

2. At all relevant times mentioned herein, defendant police officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, were employed by the defendant Bloomfield Police Department, and were each acting under the direction and control of defendant John McNiff, Chief of the defendant Bloomfield Police Department, and as the agents, servants, and/or employees of the defendant Bloomfield Police Department and the defendant Township of Bloomfield.

3. Defendants McNiff, Bloomfield Police Department, and Township of Bloomfield negligently failed to instruct, supervise, control, train and discipline on a continuing basis subordinate police officers under their direction and control to refrain from acting in a negligent, unlawful and conspiratory manner and from the use of unreasonable and excessive force.

4. Defendants McNiff, Bloomfield Police Department, and Township of Bloomfield should have had knowledge that the wrongs done or conspired to be done by said police officers, as previously set forth would result from the failure to properly train, instruct and supervise the defendant police officers.

5. Defendants McNiff, Bloomfield Police Department, and Township of Bloomfield had the authority and power to prevent or to aid in preventing the commission of the wrongs done to the decedent Ann Perlmutter and could have done so by the exercise of reasonable diligence, but they failed, neglected or refused to do so.

6. As a direct and proximate result of the negligent and intentional acts of defendants McNiff, Bloomfield Police Department and Township of Bloomfield, the decedent Ann Perlmutter suffered severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum, and Dr. Barbara Lee Perlmutter, individually, demand judgment against defendants John McNiff,

Bloomfield Police Department and Township of Bloomfield, jointly and severally, for compensatory damages, together with interest and costs of suit.

EIGHTH COUNT

1. Plaintiffs repeat and reallege each and every allegation contained in the First through Seventh Counts of this Complaint as though fully set forth at length herein.

2. On or about May 20, 1989, defendants Menzel, Depczek and Doe II, all members of defendant Bloomfield Volunteer Emergency Squad, responded to the address of the decedent located at 165 Franklin Avenue in Bloomfield, New Jersey.

3. Upon their arrival, defendants Menzel, Depczek and Doe II found the decedent in obvious need of immediate medical attention.

4. Defendants Menzel, Depczek and Doe II individually and as attendants of defendant Bloomfield Volunteer Emergency Squad, did not employ the care and skill ordinarily used by emergency squad attendants, but rather were so unskillful, careless and negligent as to improperly treat and care for plaintiffs' decedent.

5. Defendants Menzel, Depczek and Doe II were grossly negligent in failing to adequately and properly exercise appropriate medical treatment procedure and failing to conform with proper standards and procedures regarding the treatment and handling of emergency medical patients.

6. Defendants Menzel's, Depczek's and Doe II's actions were conducted either knowingly, intentionally,

maliciously or with reckless disregard for the decedent's well being.

7. As a direct and proximate result of the grossly negligent conduct of defendants Menzel, Depczek and Doe II, the decedent was caused to suffer severe pain and bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter, individually, demand judgment against the defendants jointly and severally, for compensatory and punitive damages, together with interest, costs of suit, and attorney's fees.

NINTH COUNT

1. Plaintiffs repeat and reallege each and every allegation contained in the First through Eighth Counts of this Complaint as though fully set forth at length herein.

2. On or about May 20, 1989, defendants McMahon [sic], Davis and Doe III, all members of the Mountainside Hospital Mobile Intensive Care Unit, responded to the address of the decedent located at 165 Franklin Avenue in Bloomfield, New Jersey.

3. Upon their arrival, defendants MacMahon, Davis and Doe III found the decedent in.obvious. need of medical attention.

4. Defendants MacMahon, Davis and Doe III individually and as attendants of the Mountainside Hospital Mobile Intensive Care Unit, did not employ the care and

skill ordinarily used by Mobile Intensive Care Unit attendants, but rather were so unskillfull, careless and negligent as to improperly treat and care for plaintiffs' decedent.

5. Defendants MacMahon, Davis and Doe III were grossly negligent in failing to adequately and properly exercise appropriate medical treatment procedure and failing to conform with proper standards and procedures regarding the treatment and handling of emergency medical patients.

6. Defendants MacMahon's, Davis' and Doe III's actions were conducted either knowingly, intentionally, maliciously or with a reckless regard for the decedent's well being.

7. As a direct and proximate result of the grossly negligent conduct of defendants MacMahon, Davis and Doe III, the decedent was caused to suffer severe pain and bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter, individually, demand judgment against the defendants jointly and severally for compensatory and punitive damages together with interest, costs of suit and attorney's fees.

TENTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Ninth Counts this complaint as though fully set forth at length herein.

2. At all relevant times mentioned herein, defendants Menzel, Depczek and Doe II were employed by the defendant Bloomfield Volunteer Emergency Squad and were each acting under the direction and control of defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township of Bloomfield, as their agents, servants and/or employees.

3. Defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township of Bloomfield negligently failed to instruct, supervise, control, and discipline on a continuing basis its subordinates, defendants Menzel, Depczek and Doe II, who were under their direction and control to refrain from acting in a grossly negligent manner.

4. Defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township of Bloomfield had the authority and power to prevent or to aid in preventing the commission of the wrongs done to the decedent Ann Perlmutter and could have done so by the exercise of reasonable diligence, but they failed, negligently or refused to do so.

5. Defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township

of Bloomfield directly or indirectly approved the negligent, unlawful, deliberate, malicious, reckless and wanton conduct of their subordinates, defendants Menzel, Depczek and Doe II, as previously described above.

6. As a direct and proximate result of the negligent and/or intentional acts of defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and Township of Bloomfield, the deceased Ann Perlmutter suffered severe and painful bodily injuries causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum and Dr. Barbara Lee Perlmutter, individually, demand judgment against defendants jointly and severally, for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

ELEVENTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Tenth Counts of this Complaint as though fully set forth at length herein.

2. At all relevant times mentioned herein, defendants MacMahon, Davis and Doe III were employed by the defendant Mountainside Hospital and were each acting under the direction and control of defendant Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield as their agents, servants and/or employees.

3. Defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield negligently failed to instruct, supervise, control, and discipline on a continuing basis its subordinates, defendants MacMahon, Davis and Doe III who were under their direction and control to refrain from acting in a grossly negligent manner.

4. Defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield had the authority and power to prevent or to aid in preventing the commission of the wrongs done to the decedent Ann Perlmutter and could have done so by the exercise of reasonable diligence, but they failed, neglected or refused to do so.

5. Defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield directly or indirectly approved the negligent, unlawful, deliberate, malicious, reckless and wanton conduct of their subordinates, defendants MacMahon, Davis and Doe III as previously described above.

6. As a direct and proximate result of the negligent and/or intentional acts of defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield, the deceased Ann Perlmutter suffered severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs, Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad prosequendum, and Dr. Barbara Lee Perlmutter, individually,

demand judgment against defendants jointly and severally for compensatory and punitive damages, together with interest, costs of sut [sic] and attorney's fees.

JURY DEMAND

Plaintiffs in the above matter demand a trial by jury of all issues so triable in this matter under the provisions of R:38B of the Federal Rules of Civil Procedure.

NOTO & CUBA
Attorneys for Plaintiffs

By /s/ Brenda A. Cuba
Brenda A. Cuba

By /s/ Maria DelGaizo Noto
Maria DelGaizo Noto

Dated: May 15, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 91-2140 (JWB)

DR. BARBARA LEE PERLMUTTER, et al Plaintiffs, vs MICHAEL COOPER, et al. Defendants.	)	**DECLARATION OF CLARK E. ALPERT IN SUPPORT OF MOTION FOR RECONSIDERATION**

I, CLARK E. ALPERT, of full age, hereby declare as follows:

1. I am the principal of Alpert & Raice, P.C., newly substituted attorneys for the plaintiff.

2. On June 15, 1994 I spoke to the medical expert appearing in this matter on behalf of the plaintiffs, Dr. Bennet Derby. Dr. Derby confirmed to me that he had told my predecessor, Maria Noto, Esq., some time ago, that whether or not the decedent had been literally "face down" in the sense of physical impeding her nasal or mouth breathing passages, that would not have changed his opinion that the constriction of Ms. Perlmutter's breathing by virtue of the numerous restraints applied here – restraints which he (unprompted by me) classified as "brutal" – prevented Ms. Perlmutter from breathing, and caused her death. He also said that he thought that information had been made a part of the case (yet I do not see it in the motion papers). He further indicated to me that after this "brutal" constriction took place (by which she could not breathe), any movements that would

have been seen would have been consistent with struggles by the decedent to try to breathe; and furthermore, that the most elementary steps (and, to classify in "lay" terms, the steps one would take out of common decency) – particularly after imposing such a severe constriction of the ability to breathe – would be, at minimum, the following steps *not taken here*:

(a) Constant observation of the decedent's face-particularly since the normal movements of the chest (or lack thereof) could not be visualized with the patient "upside down".

(b) Monitor the pulse every 30 seconds.

(c) Constant checking if the patient is still breathing. Specifically, in order to be able to see if breathing is occurring, which is crucial, the technician has to stay right next to, attempt to talk to, and look in the face of, the victim on the stretcher **at all times.**

(d) Constant review of tissue color to determine if cyanosis has begun, which would again be another indication that breathing is not taking place.

3. Dr. Derby will also testify that the severe, "brutal" constriction, coupled with the extraordinary deviations – from basic medical/emergency care known to every one of the persons present – caused Ms. Perlmutter to be unable to breathe for a number of minutes and led to her "negative" vital signs by the time she was visualized in the ambulance.

4. Dr. Derby will also testify that the way the victim had her hands and legs tied behind her back was a *per se*

risk to life (again, an unprompted statement by Dr. Derby).

5. My predecessor's (Ms. Noto's) file was not delivered to us until yesterday. (Some of the file was made available by my client for review last week.) The Substitution of Attorney was also not signed until yesterday. I have been unable to reach one of the plaintiff's experts or to substantively confer with another. I have not been able to complete my review of the file.

I hereby declare under penalty of perjury that the foregoing statements are true.

/s/ Clark E. Alpert
CLARK E. ALPERT

Dated: June 16, 1994

ALPERT & RAICE, P.C.
449 Mt. Pleasant Avenue
West Orange, New Jersey 07068
(201) 325-1188
Attorneys for Plaintiff

DR. BARBARA LEE PERLMUTTER, General Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually, Plaintiff(s), vs. MICHAEL COOPER, *et al.* Defendant(s),	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY DOCKET NO. 91-2140 (JWB) Civil Action **AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION** (Filed July 21, 1994)

I, CLARK E. ALPERT, of full age, being duly sworn upon my oath, hereby depose and say:

1. On July 20, 1994, our law enforcement expert, Robert diGrazia, conveyed to me an oral report representing testimony he indicated he is prepared to give, and indicated that he would be able to prepare a more formal report within the next couple of weeks.

2. Mr. diGrazia's oral report to me was a response to my memo to him earlier today, a copy of which is annexed hereto as Exhibit A. Mr. diGrazia indicated that he would separately respond to each question, in time,

and that he was providing me an oral report regarding Exhibit A as a form of summary of his conclusions.

3. Mr. diGrazia's oral report was as follows:

a. Assuming the truth of the "flailing" and "thrashing" by the victim, and assuming restraint of the victim was needed to protect the police officers from a person that victim's size, the use of handcuffs and even tying the legs could potentially be justified. However, none of what was done thereafter was justified or objectively reasonable, and the remainder definitely constituted the improper use of excessive force.

b. The testimony is that the police initiated the process of strapping her into the reeves stretcher. This was not a proper role for the police department. In other words, this was objectively unreasonable, and an intrusion into an improper area. Their role, certainly when she was handcuffed and her legs tied, was only to keep her safe until medical personnel could evaluate the situation and determine what could and should be done to protect the victim. Use of the reeves was purely a medical decision which should have awaited medical personnel, and should have been in their sole decision; and under these facts, there's no reason why, once she was handcuffed and her legs tied together, the police could not have waited for the medical personnel to make the decision. In sum, the police improperly intruded into this entire area that they should not have intruded into, and thus went far overboard to protect themselves or supposedly to protect the victim.

c. Mr. diGrazia will testify that there was no justification for so many and such oppressive restraints.

Thus, even if *arguendo* it was the police's function to determine whether to tie her to the stretcher at all, they 'overdid' it by a wide margin based on any objectively reasonable standard.

d. Assuming *arguendo* the police had any role in making the determination as to how to place the victim on the reeves (the evidence reflects that they assumed such a role here improperly, and should not have had any role), the victim should have been placed on her **side** (or on her back) on the stretcher, definitely not prone (regardless of whether her face was 'buried' or not); this is basic police training.

4. Mr. diGrazia will also testify that in circumstances such as these, the police may tend to be influenced in their treatment of someone with a 'record', even a victim, by the belief that 'once a criminal, always a criminal'; and that if the police really did perceive the victim as an African American, that could also have influenced their treatment of her. The facts here are consistent with these influences, but absolute certainty is impossible because that involves knowing what the officers were actually thinking.

5. Mr. diGrazia specifically reviewed the foregoing paragraphs of this affidavit and approved them as accurately constituting his oral report.

6. On July 20, 1994, I also spoke to our medical expert, Dr. Bennett Derby, who also reaffirmed the entirety of his oral report as communicated to me and reflected in my Declaration dated June 16, 1994; and further rendered the following supplemental report:

(a) There was no need or logic in strapping in the decedent in the way it was done, in order to transport her. Assuming *arguendo* the need to strap her in at all, first of all it was foreseeably life-threatening to strap her in a prone position. She could and should have been strapped-in on her side or on her back, with the handcuffs transferred to the front of her if necessary, and would have been perfectly transportable in that 'set-up'.

(b) In order to transport her, there was no need to constrict her chest. "Breathing is paramount." The **bottom** two straps on either or both stretchers could have been fastened around both her legs and buttocks area without any risk to her health.

(c) Assuming the alleged "thrashing" and "flailing" was occurring, then once her hands were handcuffed and her feet tied, there was no reason that at least some medical examination could not have taken place at the scene to determine what was appropriate to do 'next' on a **medical** basis, rather than the police simply deciding for their reasons to constrict her to the 'maximum' in the way that proved fatal.

7. Annexed hereto as Exhibit B is a true copy of applicable excerpts from and attachments to Mountainside Hospital's (*et al.*) Answers to Interrogatories.

/s/ Clark E Alpert
CLARK E. ALPERT

Sworn and subscribed by
me on this ___ day of
July, 1994.

/s/ Charlene L. Lundy
Notary Public of New Jersey

CHARLENE L. LUNDY
Notary Public of New Jersey
My Commission Expires May 8, 1997

[Exhibits Omitted In Printing]